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IN THE

Supreme Court of the United States

October Term, 1963

No. 3

CARLIE DI PIETRO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Carlie Di Pietro prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on June 13, 1963 (Appendix A, p. 1a).*

Citations to Opinions Below

There was no opinion in the District Court. The opinion of the Second Circuit Court of Appeals is set forth in Appendix A hereto; *infra*, p. 1a, and is not yet officially reported.

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* References in parentheses, unless otherwise indicated, are to the appendices annexed to this petition. References preceded by the letters "Tr." are to pages of the typewritten stenographic minutes of the second trial.

The record herein is the same one which is already on file in connection with the petition of Frank Mancino, presently pending.

Jurisdiction

The judgment of the Court of Appeals was entered on June 13, 1963 (Appendix A, p. 1a, *infra*). On June 28, 1963 Mr. Justice HARLAN extended the time within which to file the petition for certiorari until August 12, 1963. The jurisdiction of the Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. What procedural safeguards are necessary and proper under the federal constitution and statutes, in a mass conspiracy trial, to prevent improper harm to a defendant arising out of prejudicial statements and conduct by a co-defendant in the presence of the jury?

2. Under what circumstances must a defendant in a mass conspiracy trial in a federal court, who has neither conspired to bring about, nor contributed to such improprieties, suffer the consequences of improper statements and conduct of one of his co-defendants, which bring to the jury's attention prejudicial matter, not properly cognizable against the defendant?

Constitutional Provision and Rule of Procedure Involved

The petition raises issues under the due process clause of the Constitution and under Rule 14 of the Federal Rules of Criminal Procedure, both of which are set forth in Appendix C, p. 90a, *infra*.

Statement of the Case

1. **The Trial Proceedings:** The petitioner, Carlie Di Pietro, was indicted for violations of the federal narcotics laws, 21 U.S.C. §§ 173, 174. The indictment, filed on May 5, 1960, contained eight counts, and charged twenty-nine persons as defendants, and seven others as co-conspirators (Joint Appendix to Appellants' Briefs in the Second Circuit, pp. 115a-124a).

The first trial of the indictment before Judge LEVET in the United States District Court for the Southern District of New York ended in a mistrial after six months of trial (Joint Appendix, *supra*, p. 40a). Several defendants—not, however, including the petitioner Di Pietro—were subsequently found guilty of contempt for their behavior at the first trial and these contempt citations were subsequently affirmed on appeal. (*United States* v. *Bentvena*, 288 F. 2d 442 [2d Cir. 1961], aff'd sub nom., *Fernandez* v. *United States*, 81 S. Ct. 692, 5 L. Ed. 2d 683; *United States* v. *Galante*, 298 F. 2d 72 [2d Cir. 1962].)

Prior to the second trial of the indictment all counts except those numbered four, five and eight were severed (Joint Appendix, *supra*, p. 79a). Only 14 of the 29 named defendants actually were brought to trial, the others having been severed or having been unavailable for retrial. Of those who went to trial, only three were charged with substantive counts of possession under counts four and five, while all fourteen—including the petitioner Di Pietro—were charged in count eight, a general conspiracy count.

The second trial began in the Southern District of New York before Judge MACMAHON and a jury on April 2, 1962. On June 19th, the trial judge granted a motion for acquittal as to the defendant Mari and on June 25, 1962, the jury

returned a verdict of guilty as to all the other defendants on all counts in which they were named (Tr. 9,029).

After the second trial, in addition to the sentences imposed on the jury's verdict, all defendants but two were also adjudged guilty of contempt by Judge MacMahon. Di Pietro's sentence on the conspiracy count of the indictment was 20 years. His additional sentence for contempt was only 3 days—less than any other contempt sentence, some of which ranged up to more than a year. Having been remanded with all the other defendants during the course of trial (Tr. 524) and having been refused bail after sentence (Tr. 12,058), Di Pietro is presently serving his term of imprisonment.

2. **The General Nature of the Proof:** The defendants and their co-conspirators were charged with a conspiracy to import narcotics into the United States from Canada and to market them after their importation. The principal government witnesses were Edward Lawton Smith, a former member of the alleged conspiracy who was the chief witness, and Patrick Biase, an undercover agent of the Bureau of Narcotics, who, with Smith's help, infiltrated into the alleged conspiracy.

In outline, the government's evidence showed that a group of Canadians headed by one "Pepe" Cotroni handled the exportation of the drugs into the United States. Couriers brought the drugs across the border and into the New York metropolitan area where they were diluted, packaged and distributed to various outlets throughout the area. The evidence was that the petitioner Di Pietro was one of the distributors who operated out of the Vivere Bar on Second Avenue in New York City (Tr. 1,463, 1,468, 1,478, 1,492).

3. **The Atmosphere and Character of the Trial:** This was undoubtedly one of the most extraordinary trials ever held in a federal courtroom; in the trial judge's own words, it was marked by "outrages unequaled in a court of justice in Anglo-Saxon history" (Tr. 9,051).

The objective statistics raise serious doubt concerning the capacity of a jury to inquire rationally and dispassionately into the defendants' guilt. The trial—punctuated by numerous interruptions—lasted for some three months, involved the taking of testimony from some 120 witnesses, and consumed approximately 10,000 pages of typewritten transcript. This mass of testimony not only related in widely varying degrees to the 14 defendants on trial, but also to the 22 other co-conspirators. And in addition to the huge volume of testimony, there were some 275 exhibits to which reference was made during the course of trial.

Aside from the ponderousness of the trial proceeding and the sensational press treatment of the case (see, *e.g.*, Trial Court Exhibits 67-71, 76, 144, 145, 180, 184), the orderly management of the trial was further bedeviled by the trial judge's clearly, oft-expressed, and firmly held conviction that a conspiracy was afoot among all the defendants to cause a mistrial, and by a series of bizarre and irrational acts on the part of some of the defendants, which were extremely prejudicial to other defendants.

Before the retrial was two days old, the court openly declared its settled conviction that all of the defendants were jointly responsible for the prior mistrial. Responding to an assigned attorney's complaint that his clients would not speak to him because they felt they were being

deprived of the right to counsel of their own choice, the trial judge said (Tr. 124):

> "It is a put up job right in front of my eyes. I am not going to let you or them get away with it."

On the very next day, after a witness had wrongly identified one of the defendants, and indeed actually admitted his mistake (Tr. 497, 519-20), the trial judge, speaking in the presence of the jury, said concerning that incident (Tr. 460):

> "there was no doubt in the court's mind who he identified."

And, shortly thereafter, when the court remanded all the defendants, and revoked their bail, it referred to the foregoing as "trickery that I saw before my very eyes", concluding that "the only way to conduct this trial is to remand these defendants" (Tr. 524).

Other occasions on which the trial judge expressed and acted upon his belief that the defendants were all engaged in a "plot" to subvert the trial abound in the record. Thus, for instance, when an attorney for one of the defendants was prevented from attending the trial because of a heart attack, the trial judge remarked (Tr. 1546-7):

> "A defendant cannot get a man with a built-in heart attack to defend him in one of these cases and escape justice."

And, when one of the defendants fell in the West Street jail, during an overnight recess, and was brought into the courtroom next day in a wheelchair, the court denied a motion for a continuance, with the remark that (Tr. 1765):

> "the indications are that he is faking."

Similarly, after one of the numerous psychotic outbursts by the defendant Salvatore Panico, in which he screamed

in the jury's presence that the petitioner Di Pietro was a "convicted dope pusher" (Tr. 5,889), the trial judge declared, in open court (Tr. 5,890):

"Mr. Krieger, it is obviously a put-up job."

On the occasion of another of Panico's irrational interruptions, the trial judge expressed himself as being convinced that the incident was "taken right from *Aviles*, as though a script were written in that case" (Tr. 5,662).* And he later characterized the same incident as having been "planted" (Tr. 5,664). Any number of other such episodes demonstrate the trial court's firm conviction—frequently expressed in the jury's presence—that a "plot" on the part of all defendants to obstruct justice was afoot (Tr. 124, 524, 587, 1,438, 1,601-2, 1,721, 5,662, 5,727-8, 5,874, 5,875, 5,890, 5,918, 5,978, 6,775, 6,844, 7,326, 7,336, 7,376, 7,839, 7,856, 8,113, 9,339).

To the prejudice arising from the trial judge's attitude and remarks, must be added that stemming from the conduct and statements of co-defendants. The most horrendous of the series of offenses against the dignity and orderliness of the trial were those perpetrated by the defendant Salvatore Panico.

Panico showed no signs of emotional stress nor did he engage in contemptuous behavior at the first trial. In the seventh week of the retrial, however, without any apparent provocation, he went literally berserk. As the trial judge returned to the courtroom after a recess, Panico jumped from his seat and leaped into the jury box, pushing the

* In *United States* v. *Aviles*, 274 F. 2d 179, 193 (2d Cir. 1960), cert. den. 362 U. S. 974, one of the defendants burst into a tirade before the jury in which he asserted that "all those on trial were convicts and that some of them were serving time in prison."

jurors in the front row and threatening those in the rear. The courtroom was thrown into a turmoil as Panico screamed (Tr. 5,649):

> "Get out of here. The judge has got me guilty. Big John, Joe B, they are the junk pushers. We're innocent my brother and I, we haven't got anything to do with this thing . . ."

The day following this bizarre incursion into the jury box, Panico again shattered the uneasy calm of the trial by referring to the petitioner Di Pietro, within the hearing of the jury, as (Tr. 5,707):

> "good looking Carlie . . . the pusher."

On the very next day, in the presence of the jury, Panico again blurted out the statement that (Tr. 5,889):

> "Di Pietro . . . is the convicted dope pusher."

And some few days after this, again before the jury's eyes, Panico shouted that (Tr. 6,023):

> "Galante was in the Apalachin meeting with all the top hoods in the country and that is where they got all the orders for all these narcotic pushers."

Panico, although the most violent and frequent offender, was not the only defendant whose improper outbursts disrupted the trial. Thus, Mirra, for instance, picked up the witness chair and actually hurled it at the prosecutor. The chair missed its target, but shattered against the jury box (Tr. 6,462-4). Disruptive behavior by other defendants is to be found at numerous places in the record (Tr. 1,481, 1,558, 1,665, 2,191, 2,203, 2,214, 2,316, 3,257, 5,547, 5,706, 5,869, 5,890, 6,174, 6,434-5, 6,462-3).

In contrast, however, the only occasion on which the petitioner Di Pietro uttered a single word or committed any act which might conceivably have merited reproof,

during the entire course of both lengthy trials, was when he was called a "dope-pusher" by Panico in the jury's presence. He was then provoked into saying to his lawyer, Albert Krieger (Tr. 5,889): "Stop him. I told you Al." The trial court itself recognized the inoffensive character of this remark, and the strong provocation under which it had been uttered, when, in sentencing Di Pietro to the least severe of the post-trial contempt penalties (three days), it stated that (Tr. 9,060):

> "In sentencing you to only three days, I am mindful of the extreme provocation."

The Court of Appeals, we note, never passed on Di Pietro's contempt citation, regarding it as "moot." (*United States v. Bentvena*, 304 F. 2d 883 [2d Cir. 1962].) In this regard, Di Pietro's posture is somewhat different from that of most of his co-defendants, whose contempt convictions were upheld on appeal.

The trial judge's response to the extraordinary strain placed upon the process by the cumbersome and unwieldy nature of the trial proceeding and the behavior of some of the defendants was not only inadequate to remove the prejudice, but actually contributed to that prejudice. Although, as has been shown above, he was convinced that the abortive ending of the first trial had been intentionally caused by the defendants, and although some of the defendants had been sentenced for contempt because of their behavior at the first trial, Judge MacMahon refused to grant any of the pre-trial motions for severance. Likewise, he denied repeated motions for severance and for mistrials which were made on the occasions of each of the prejudicial outbursts by individual defendants. (See, *e.g.*, Tr. 5,655, 5,659-60, 5,682, relating to the Panico inci-

dents; see, also, *e.g.*, Tr. 3,253-4, 6,551-9, 6,553, 6,747.) Furthermore, he refused to permit Panico to be examined by psychiatrists until after Panico's third outburst (Tr. 5,724, 5,873), and he denied all requests for a *voir dire* examination of the jurors as to the effect which the defendants' extraordinary acts might have had on them (Tr. 5,661, 5,682, 5,873, 5,877, 6,049, 6,071, 6,086).

That there were untoward effects on the jury by virtue of the violence in the courtroom is shown by the fact that on June 5th the trial court was informed by the marshal that one of the jurors had asked the marshal to escort her to the subway because none of the other jurors took the same subway as she did and she did not want to go home alone (Judge's Minutes, June 5, p. 1). What else, of similar import, as to the state of mind of this juror and other jurors, might have been elicited by a *voir dire* examination can only be conjectural, but it is fair to speculate that the impact on the jurors was profound and shattering, and militated against objective consideration of the merits of the case against individual defendants who did not take part in the violence.

Even when the trial court eventually—and reluctantly—agreed to permit a psychiatric examination of Panico, however, the inquiry was *not*—as requested by counsel (Tr. 5,783)—whether he was so emotionally disturbed as to threaten the violation of the *other* defendants' rights to a fair trial; rather, it was limited to *Panico's* competence to stand trial (Tr. 5,991). Although there was contradictory psychiatric testimony as to this latter issue (Tr. 5,906, 5,915, 5,968-9, 6,025-6), the court declared him competent and refused to sever his trial from that of the defendants he had attacked. No account was taken of the fact that,

aside from evidence of competency, each of the three psychiatrists who testified found Panico to be laboring under profound emotional disturbance, and at least two of them predicted future trial disruptions (Tr. 5,906, 5,915, 5,917, 5,921, 6,004, 6,013, 6,027-6,028, 6,031, 6,033).

Until the end of the trial and despite the psychiatric testimony, the trial judge insisted that Panico was "as sane as anybody" and that his acts were part of a "put up job" (Tr. 9,045). However, it was eventually made clear, after the completion of the trial, that Panico was a schizophrenic, and on August 22, 1962, he was committed to the Dannemora State Hospital for the Criminally Insane by order of the Westchester County Court. (*United States* v. *Panico*, 308 F.2d 125, 129 [2d Cir. 1962].)

Actually, aside from weak and ineffectual cautionary instructions to the jury (see, *e.g.*, Tr. 5,640, 5,662), the trial court's only attempts to cope with the outrages perpetrated by *certain* of the defendants was to apply increasingly harsh repressive measures to *all* the defendants. Thus, as previously indicated, on the third day of trial, he revoked the bail of all of the defendants. On May 1st, and again on May 3rd, the trial judge added marshals to the courtroom, so that on May 3rd there were between 13 and 15 marshals stationed in the courtroom behind all of the defendants and in the four front rows of spectators' seats which the court directed to be vacated; to provide a zone of separation between the defendants and the spectators (Tr. 3,253-3,254, 3,494). The atmosphere of the courtroom as virtually that of an armed camp was considerably heightened when the court decided first to gag and shackle Salvatore Panico, then to gag and shackle his brother Carmine, another of the defendants, and finally to do the same with the defendant Mirra, who had thrown the chair

(Tr. 6,088, 6,089, 6,472). Mirra and Carmine Panico testified while surrounded by marshals, and Panico was actually secured to the witness chair by leg irons when he took the stand (Tr. 6,319-20, 6,339, 7,918).

After the trial was over the court conducted contempt proceedings. It then held all but two of the defendants in contempt and imposed sentences ranging from 3 days to 15 months (Tr. 9,048, *et seq.*). Significantly, although—as has been shown above—the court had made repeated references during the trial to a concerted plan among the defendants to obstruct the trial, in the contempt proceeding it treated each contempt as an individual crime. And, by acknowledging that the petitioner Di Pietro's "offense"—his cry to his lawyer, "Stop him. I told you, Al"—was the product of "extreme provocation", it virtually exonerated him from any participation in any "conspiracy" (Tr. 9,060).

4. **Proceedings Before the Second Circuit Court of Appeals**: The case was argued before the Court of Appeals for the Second Circuit (MOORE, SMITH and HAYS, Circuit Judges) on January 30, 1963, and decided on JUNE 13, 1963. The Court (MOORE, *J.*, dissenting) reversed the judgments against Bertvena, Monasterský and Struzziero—who had been tried on both the substantive and conspiracy counts—on the ground that the joint trial of the substantive counts with the conspiracy count against all the defendants was a prejudicial misjoinder. While Judge MOORE agreed as to the reversal of the conspiracy count, he indicated that he would affirm as to the substantive counts against these three defendants (Appendix A, pp. 71a-82a, *infra*). The court also unanimously reversed the conviction of Salvatore Panico because he was deprived of his right to testify in his own behalf; his outrageously disruptive

conduct did not—as the trial court believed—constitute a waiver of his right to testify in his own behalf (Appendix A, pp. 52a-57a, *infra*).

Finally, the court unanimously affirmed as to all of the other defendants. The court agreed with the trial court as to the unprecedented and bizzarre character of the trial proceeding, writing as follows:

> "Suffice it to say that more abhorrent conduct in a federal court and before a federal judge would be difficult to conceive" (Appendix A, p. 24a).

It nevertheless concluded that

> "the trial judge, notwithstanding . . . harassment, maintained an impartial attitude and did all in his power to safeguard the right of the defendants and to minimize the effects of [the] outbursts."

As to the petitioner Di Pietro's contention that he had been gravely prejudiced by his co-defendants' outbursts, although he had neither conspired to produce them nor contributed to them, the court answered by relying squarely on its prior holding in *United States v. Aviles*, 274 F. 2d 179, *supra*, where a similar prejudicial outburst had occurred. In that case the court had written as follows (274 F. 2d, at p. 193):

> "Manifestly it was not error to deny the mistrial motions. If such conduct by a co-defendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so."

Likewise, the court rejected the petitioner Di Pietro's contention that it was error for the trial judge to have failed to sever the trial of Panico. It was the view of the court below that,

> "After the incident had occurred, severance would not have protected the remaining defendants from any possible prejudice. It would have simply afforded each defendant an easy escape from the trial" (Appendix A, p. 28a, *infra*).

Although it did so by inference rather than expressly, the appellate court also gave its approval to the trial judge's restriction of the psychiatric examination of Panico to the issue of *his* competency to stand trial; rather than extending it to include a determination whether Panico was so mentally ill as to be likely to cause disturbances prejudicial to the rights of his *co-defendants* (Appendix A, pp. 28a-29a, *infra*). Finally, the court also gave short shrift to the contention that the trial judge had openly exhibited bias against the defendants (Appendix A, p. 30a, *infra*). The rest of its opinion consisted of an analysis of problems of proof and representation relating to individual defendants other than the petitioner.

Reasons for Granting the Writ

1. This Court has never passed upon the important issue of constitutional law and federal trial procedure decided by the Second Circuit in *United States* v. *Aviles*, 274 F. 2d 179, *supra*, and applied herein, holding a defendant in a mass conspiracy case responsible for trial disorder created by a co-defendant.

For some years now, the conspiracy prosecution has been the subject of considerable critical comment. Much of the discussion has turned on the character of the substantive concept of conspiracy and many courts and writers have decried the ease with which prosecutors can use the device of conspiracy trials to thwart the true ends of justice. (See, *e.g.*, *Krulewitch* v. *United States*, 336 U. S. 440, 453, *per* JACKSON, *J.*, concurring; *Kotteakos* v. *United*

States, 328 U. S. 750, 776; *Harrison* v. *United States*, 7 F. 2d 259, 263; *Sayre*, "*Criminal Conspiracy*", 35 Harv. L. Rev. 393.) It was in this context that the late Judge HAND, writing for the Second Circuit Court of Appeals, pinned a lasting label on conspiracy—"the darling of the modern prosecutor's nursery" (*Harrison* v. *United States*, 7 F. 2d 259, 263, *supra*).

Aside from its substantive aspect, however, thoughtful discussion of the conspiracy prosecution has also turned to the procedural pitfalls it presents. (See, *e.g.*, *Kotteakos* v. *United States*, 328 U. S. 750, 776, *supra*; *Krulewitch* v. *United States*, 336 U. S. 440, 445, *supra*; *United States* v. *Agueci*, 310 F. 2d 817 [2d Cir. 1962]; Committee of the Judicial Conference of the United States, "*Report on Procedure in Anti-Trust and Other Protracted Cases*", 13 F.R.D. 62; 1925 Atty Gen'l Ann. Rep. 5-6; O'Brien, "*Loyalty Tests and Guilt by Association*", 61 Harv. L. Rev. 592, 602; Ryan, "*A Judicial Solution to the Procedural Problems of the So-Called Big Case*", 41 Geo. L. J. 182; Note, "*The Challenge of the Mass Trial*", 68 Harv. L. Rev. 1046; Note, "*The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*", 62 Harv. L. Rev. 276.) As the Second Circuit recently announced in the *Agueci* case, "The trial of these multiple-defendant conspiracy cases poses a great problem for the district judge", and there has been a "disconcerting increase" in the number of such trials. (*United States* v. *Agueci*, 310 F. 2d, at p. 840). In general, courts and writers who have considered the procedural problem posed by the conspiracy trial have concluded that it presents a grave threat to the individual right of each alleged conspirator to be accorded a fair trial. As this Court itself

has said, conspiracy trials are "proceedings * * * exceptional to our tradition and call for the use of every safeguard to individualize each defendant in relation to the mass." (*Kotteakos* v. *United States*, 328 U. S. 750, 773, *supra*.)

It is in this context of concern over the procedural fairness of the mass conspiracy trial that this Court is now asked to decide, *for the first time*, whether one defendant in a mass conspiracy trial must suffer the consequences of trial disorder created by a co-defendant, which he has neither conspired to bring about, nor contributed to.

It is fundamental, of course, that "a fair trial in a fair tribunal is a basic requirement of due process." (*In re Murcheson*, 349 U. S. 133, 136.). It is also clear that a federal trial must be orderly and free of the influence of those passions and prejudices which would destroy a juror's capacity for an independent judgment of guilt based on the evidence. (See, *e.g.*, *Moore* v. *Dempsey*, 261 U. S. 86.) The challenge which the conspiracy trial presents is whether the fair trial standard must bend to the exigencies of a mass prosecution.

In the *Aviles* mass conspiracy case (274 F. 2d 179, *supra*), one defendant rose before the jury and screamed that "all those on trial were convicts and that some were then serving time in prison" (274 F. 2d, at p. 193). During the mass narcotics conspiracy prosecution on which the instant petition is founded, one of the defendants arose before the jury on a number of occasions to rant that other of the defendants—including the petitioner—were "convicted dope pushers" and "junk pushers" (Tr. 5,649-55, 5,707, 5,889, 6,083). In addition to these prejudicial and ordinarily reversible matters being put before the jury,

the atmosphere of the trial was also befouled, among other things, by Panico's leap into the jury box, and his physical threats to the jurors (Tr. 5,649-55); the throwing of a chair which shattered against the jury box, by another defendant (Tr. 6,462-4); the gagging and shackling of three defendants (Tr. 6,088, 6,089, 6,472); and by the presence of a veritable platoon of armed federal marshals surrounding *all* of the defendants—mute reminders that the defendants were *all* deemed by the court to be dangerous and desperate characters.

Despite this extraordinary turmoil and palpable prejudice, the Second Circuit Court of Appeals answered the contention made by the present petitioner that the trial was unfair by repeating the rule which it had previously laid down in the *Aviles* case; namely,

> "Manifestly it was not error to deny the mistrial motion. If such conduct were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so." (274 F. 2d, at p. 193; Appendix A, p. 27a, *infra*).

Thus, in effect, the Second Circuit would hold each defendant in a mass conspiracy trial to be a guarantor of the conduct of each of his fellow defendants, without any inquiry to fix individual responsibility for the disorder and prejudice generated. In effect, the decision by the Second Circuit would *impute* the responsibility for the acts of any single defendant to *all* of the defendants.

This Court has steadfastly refused to enlarge or extend the already loose and dangerous doctrine of conspiracy, and has condemned efforts to create "implicit conspiracies", with objectives other than the ones charged in the

indictment. (*Krulewitch* v. *United States*, 336 U. S. 440, at p. 444.) It should now review the instant case where a new and dangerous theory of "implicit conspiracy" is sought to be erected.

The petitioner herein contends that the rule applied below has never been sanctioned by this Court and it violates the fundamental notions of responsibility for individual guilt and the rudiments of fair trial. Besides violating these basic constitutional and jurisprudential presuppositions, the *Aviles* rule as applied by the Second Circuit is calculated to generate rather than dissuade trial disturbance in a mass conspiracy case.

Thus, there can be no doubt that a defendant or group of defendants who have instigated, or conspired to cause, a disorder at trial should be precluded from claiming injury as a result of such disorder. In other words, no benefit should enure to *them* from their own malefactions. The rule applied by the Second Circuit in the present case and in the *Aviles* case goes much beyond this, however. It erects a presumption of a conspiracy to obstruct justice merely and solely from the occurrence of trial disorder during a conspiracy trial; in effect, the *Aviles* rule presumes a "second conspiracy"—an "implicit conspiracy" to obstruct justice—from the mere fact that one of the defendants on trial for conspiracy created a disturbance during trial. Moreover, it sanctions a rule of practice in which no inquiry is permitted or is even relevant as to who was responsible for the disorder, and relieves the government of the burden of any proof on this vital question.

Accordingly, in the present case, the Second Circuit *presumed* that all of the defendants conspired to create the disturbance which marred the trial; moreover, it pre-

sumed this, it seems clear, solely from the fact that the defendants were being tried together for conspiracy. No hearing was held as to whether there actually was a conspiracy to obstruct justice. And yet, applying the *Ayiles* rule, the Second Circuit summarily rejected the pleas of even those defendants who were found by the trial judge not to have been contemptuous. It apparently was fearful that allowing a mistrial for trial disorder in a mass conspiracy trial

> "would provide an easy device for defendants to provoke mistrials whenever they might choose to do so" (Appendix A, p. 27a, *infra*).

In effect, under the rule of the Second Circuit, then, the act of one defendant in a mass conspiracy trial must be treated as the act of all, without inquiry as to individual responsibility or participation in wrongful disruptive acts. Surely, this is to elevate form, rather than substance, into a shibboleth.

To impute responsibility for disorders during the course of a conspiracy trial to *all* of the defendants on trial on no other ground than that they were *jointly tried*, and thus had a common interest, obviously violates the right of *each* of the defendants in a conspiracy trial to have his guilt determined individually. (See, *e.g.*, *Kotteakos* v. *United States*, 328 U. S. 750, 773-776, *supra*.) And the same rule is violated if the imputation of responsibility for the disorder at a trial is sought to be drawn solely from the fact that the alleged conspirators were found to be guilty, even on substantial evidence, of the crime of conspiracy with which they were charged in the indictment. One cannot necessarily infer that men conspired to obstruct the orderliness of their joint trial merely from the fact that they

were tried together, or from the fact that they were found guilty at the trial of conspiring to do some other criminal act. Yet the rule of the *Aviles* case, as expounded in the present case, does precisely this.

Due process, we submit, requires that, before a particular defendant in a conspiracy case may be barred from claiming prejudice as a result of the acts of his co-defendants at trial, a court must first find that that individual defendant was a party to a plot to create the prejudice at trial, or at least, that he was in some way responsible for it, and must accordingly suffer the consequences of it. Membership in what we may call a "second conspiracy"—an "implicit conspiracy" to obstruct justice—must first be established in some way known to our law, which does not offend a decent respect for the federal courts and their essential dignity and fairness. Before a defendant on trial for the crime of conspiracy can be said to be required to suffer the consequences of outbursts prejudicial to him, made by one of his co-defendants during the trial, there should be a fair way to determine his guilt.

Besides violating concepts of individual justice, the *Aviles* rule, with the gloss on it of the holding in the instant case, also represents an unsound and impractical approach to the vexing problem of deterring trial disorder in a mass prosecution. The Second Circuit rests the *Aviles* rule on the ground that granting a mistrial for prejudice created by a co-defendant "would provide an easy device for defendants to provoke mistrials whenever they might choose to do so" (Appendix A, p. 37a, *infra*). This is only so if it is supposed that the individual perpetrators of prejudice will go unpunished and if it is further supposed that the defendants harmed by the prejudice did actually plan and participate in it. If, however, the actual perpe-

trator of disorder is punished promptly and severely for *his* contempt, disorder will quickly lose its supposed charm as an "easy device" for engineering a mistrial. Furthermore, because of its inherent injustice, a rule which holds *all* defendants responsible for the contempts of *one* of them tends—as does the concept of group responsibility generally—to foster individual irresponsibility. The bitterness and anti-social behavior encountered among criminals on trial will scarcely be lessened if the defendants feel that the "justice" imposed upon them is really injustice, and that they have nothing to gain from proper behavior. The experience of every prison warden bears this out.

Since there has been a "disconcerting increase" in mass conspiracy trials (*United States* v. *Agueci*, 310 F. 2d 817, 840, *supra*), and since there is good reason to believe that the *Aviles* rule applied by the Second Circuit in such cases is constitutionally improper and administratively unwise, this Court should undertake to review the fair trial problem posed by trial disorder and prejudice created by one of several defendants in a mass conspiracy case.

2. The Second Circuit sanctioned two novel procedural rules as to severance which are mistaken and which are vitally significant to the proper management of mass conspiracy trials.

One of the most important "safeguards" enjoined upon the courts under the principle set forth in *Kotteakos* v. *United States* (328 U. S. 750, *supra*), for the protection of the rights of individual defendants in mass conspiracy trials is the availability of the device of severance of the trial of any alleged conspirator who, because of his conduct or his mental state, would present a threat to the right of each of the other alleged conspirators to a fair trial.

To be sure, no defendant has an absolute right to a severance. Rule 14 of the Federal Rules of Criminal Procedure sets forth the applicable rule of severance in this fashion:

> "If it appears that a defendant * * * is prejudiced by a joinder of * * * defendants in an indictment * * * or by such joinder for trial together, the court may * * * grant a severance of defendants."

Plainly, this rule provides for an exercise of discretion by the trial judge as to whether there appears to be a likelihood of sufficient prejudice to any given defendant to warrant severing his trial. (See *e.g., Schaffer* v. *United States*, 362 U. S. 511, 516; *Opper* v. *United States*, 348 U. S. 84, 95.)

It is also abundantly clear that (a) although the granting or denial of a severance is within the sound discretion of the trial court, the exercise of that discretion is subject to review and correction if it is abused (see, *e.g. United States* v. *Haupt*, 136 F. 2d 661 [7th Cir. 1943]; *Burk* v. *United States*, 134 F. 2d 879 [5th Cir. 1943]; *Dowling* v. *United States*, 249 F. 2d 746 [5th Cir. 1957]); and (b) that the discretion vested in the trial judge under Rule 14 must be exercised *throughout the trial* and, if it appears *at any point in the trial* that prejudice will result from a failure to sever, the trial judge must order a severance. This Court stated the latter proposition emphatically in the *Schaffer* case (362 U. S. 511, 516) when it declared "We * * * *emphasize* * * * that * * * *the trial judge has a continuing duty at all stages of the trial* to grant a severance if prejudice does appear." (Italics supplied)

In affirming the judgment of conviction in this case, the Second Circuit apparently applied two criteria with respect to severance which fly in the face of these basic principles laid down by this Court in the *Kotteakos* and *Schaffer*

cases. The first of these novel rules is that, after a prejudicial outburst has occurred, severance is not important as an available device for the management of a mass conspiracy trial. In the Second Circuit's words, "After the [prejudicial] incident had occurred, severance would not have protected the remaining defendants from any possible prejudice." See Appendix A, p. 28a, *infra*. The second of the heretofore unprecedented rules of severance announced by the Second Circuit is that the test of the propriety of a continued joinder during trial under Rule 14 of the Federal Rules of Criminal Procedure is whether the acts of a defendant on trial which prejudice his co-defendants were caused by reason of insanity.

The petitioner contends that each of these rules is novel and important in relation to the proper administration of mass conspiracy trials, and should, therefore, be reviewed by this Court.

The Second Circuit's holding that, after the prejudicial outbursts in this case, the device of severance "would not have protected the remaining defendants" is, at the very least, highly questionable. The plain fact is that, in the instant case, had the trial of Salvatore Panico been severed after the *first* of his outbursts—his leap into the jury box and the identification of "Big John" and "Joe B" as "junk pushers" (Tr. 5,649-55)—numerous other defendants, including the petitioner, would not have been prejudiced by his *subsequent* outbursts (See, e.g., Tr. 5,707, 5,889, 6,083).

As for the Second Circuit's fear that a severance of Panico's trial at this early stage "would have simply afforded each defendant an easy escape from the trial", it is respectfully contended that this fear is obviously a mistaken one. A trial court has unlimited discretionary

power to punish for contempt. (See, 18 U.S.C., §401; see also, *e.g.*, *United States* v. *Brown*, 247 F. 2d 332 [2d Cir. 1957], aff'd 359 U.S. 41.) The stern and prompt exercise of this ancient and well-established power in conjunction with a timely severance would more surely deter future contempts, while protecting vital constitutional rights of co-defendants, than the iron-fisted, repressive and unfair kind of trial administration approved herein by the Second Circuit. Moreover, it would be dignified and fair, and far more in the tradition of trials in the federal courts as we have known them.

Turning to the second rule of severance condoned by the Second Circuit, it too appears to be ill-conceived. Although the court's reasoning on this score is far from clear, it appears to lay down the rule that a defendant is only prejudiced by the joinder of a co-defendent, within the meaning of Rule 14, if that co-defendant is incompetent to stand trial.

Thus, after each of Panico's outbursts, *counsel for his co-defendants* moved that the trial court have him psychiatrically examined (Tr. 5,679, 5,682, 5,724, 5,873). It was only after the third outburst; however—the second in which the petitioner was identified by Panico as a "dope pusher" —that the court finally agreed to order an examination.

Significantly, however, the court's inquiry at this point was not into whether Panico was so emotionally disturbed as to threaten the violation of the *other defendants' rights* to a fair trial, but rather only into whether *he was competent to stand trial himself*; in other words, the inquiry was limited to ascertaining if Panico understood the charges against him and could cooperate in his defense (see, *e.g.*, Tr. 5,906, 5,968-9, 6,080-1).

It is our submission that the psychiatric examination which the trial judge ordered should not have been so

limited. The court, having been expressly alerted by Di Pietro's trial attorney to the need for a psychiatric examination to avoid prejudice to the *other defendants* (Tr. 5,873), should not have restricted that examination solely to the issue of Panico's competency to stand trial. So to limit it violated the underlying principle of severance, enunciated by Rule 14 of the Rules of Criminal Procedure, and failed to carry out the trial judge's "continuing duty at all stages of the trial to grant a severance if prejudice does appear." (*United States* v. *Schaffer*, 362 U. S. 511, 516, *supra*.) Palpably, that rule is concerned with avoiding prejudice to any defendant on trial, and not merely with the rights of the defendant whose actions have caused prejudice to others.

As it turned out, even the psychiatric testimony as to *Panico's competency* was not unanimous (see, Tr. 5,906, 6,025-6, 5,968-9). But, more important from the point of view of protecting the other defendants from the effects of Panico's psychotic outbursts is the view expressed by *all of the psychiatrists* that Panico "*was not malingering*" (Tr. 5,917-20, 5,971, 6,031, 6,033), and that one could "predict he would lose control of himself at least 75 percent of the time." (Tr. 5,915, 6,031, 6,033). The trial court's decision not to sever the trial of Panico took no account of this testimony as to the possibility of future outbursts, when it restricted the inquiry solely to the issue of competency. (Tr. 5,991). And this view of the matter was condoned by the Second Circuit. (See Appendix A, pp. 28a-29a, *infra*.) Thus, the "continuing duty at all stages of the trial to grant a severance if prejudice does appear" enjoined upon the trial court was not fulfilled, and the court failed to exercise its powers in favor of those for whom the protection of the Rule was envisaged, *i.e.*, the co-defendants of Panico.

Actually, severance would have been in order under Rule 14 even if the defendant Panico had not been emotionally disturbed; even, in other words, if he had done what he did with the reasoned and deliberate purpose of destroying his fellow defendants, or of visiting some private vengeance on them. The trial court and the Second Circuit however, have, by the decision herein imported into Rule 14 the unwarranted restriction that a defendant is only "prejudiced by a joinder" if his co-defendant is *incompetent to stand trial.* It is urged that such a restriction is erroneous and, since it is an important aspect of the administration of justice in the federal courts, it should be reviewed by this Court and struck down.

3. Since the petitioner Di Pietro was not shown to have been in any way responsible for Panico's insane outbursts, but suffered grave prejudice from them, preventing a fair trial, his conviction should be reversed.

It is perfectly apparent from this record that the trial judge was persuaded from the very inception of the trial herein that the first trial proved abortive because the defendants deliberately conspired to bring about that result. It is also obvious that the trial judge was utterly convinced that a similar pattern of concerted obstruction was being attempted in the trial taking place before him. He voiced this firmly-held belief on numerous occasions, and his repressive attitude toward the defendants and their counsel amply reflects it. (See pp. 5-7, *supra*.)

The trial court's assessment of Panico's outbursts was that they were part and parcel of the continuing conspiracy among the defendants which had obstructed the first trial and which was intended to bring the present one to a similar inconclusive end. Thus, on the afternoon of Panico's pugnacious foray into the jury box, the trial judge, agree-

ing with the prosecutor, said that "the incident is almost taken right from *Aviles*, as though a script were written in that case" (Tr. 5,662). And, after Panico identified Di Pietro before the jury as "good looking Carlie * * * the pusher" (Tr. 5,707), the court took judicial notice of what had happened on the earlier trial of this case, and went on to say that Panico's "words * * * are almost the script taken from the *Aviles* trial" (Tr. 5,874-5). After Di Pietro had been pointed out to the jury by Panico for a second time as a "convicted dope pusher" (Tr. 5,889), the court, in the jury's hearing, said to Di Pietro's trial lawyer, "Mr. Krieger, it is obviously a put-up job" (Tr. 5,890). And, when he was sentencing Panico for contempt after the trial had been completed, the judge again repeated his evaluation of Panico's conduct in these words (Tr. 9,154):

> "His acts were wilful, deliberate, calculated to impede, obstruct, delay and abort this trial * * * There is nothing insane about this man whatever."

Putting aside the fact that the unanimous testimony which was elicited from three psychiatrists was that Panico was "not malingering", and even disregarding the fact that Panico's subsequent commitment to a mental hospital as a psychotic person* raises grave doubts concerning the correctness of the trial judge's conclusion that "there is nothing insane about this man" (see pp. 23, 27, 28, *supra*); even disregarding the fact that the trial court erroneously considered that a severance and a mistrial could be appropriate only if Panico were incompetent to stand trial himself, but not if he were so mentally ill as to be subject to disruptive outbursts which would prejudice the rights of others to a fair trial (see pp. 24-25, 41, *supra*); there re-

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* On August 22, 1962, the County Court of Westchester County made an order adjudicating Panico insane, and committing him to the hospital for insane prisoners at Dannemora. See, also, *United States* v. *Salvatore Panico*, 308 F. 2d 125 (2d Cir. 1962).

mains yet another question which this Court must determine. That is, whether there is even a scintilla of an indication in this record, or in the record of the first trial, that Di Pietro was in the slightest degree responsible for Panico's outbursts, either as having conspired to cause them or as having contributed to them.

If Di Pietro caused or conspired to cause Panico's outbursts—and we will assume that whether they were wilful or not is irrelevant—he cannot, in fairness, avail himself of a claim of error based upon any prejudice resulting from them. We agree that he must suffer the consequences of his own wrong, if he committed one. But, on the other hand, if he was innocent of any complicity whatsoever in regard to these outbursts, surely he should be heard to complain of their prejudicial effect on him. It thus becomes a critical question on this appeal to determine whether Di Pietro conspired to cause, caused or in any manner contributed to Panico's wild outpourings which brought to the jury's notice the inadmissible and prejudicial statement concerning Di Pietro's prior conviction for the very same type of crime for which he was on trial.

Although, as has been indicated, the trial court viewed Panico's behavior as deliberate, and asserted on more than one occasion that it was all part of a "plot", it is highly significant that, in sentencing Di Pietro for contempt, he made no mention of the latter's having been part of any plot to obstruct justice. Furthermore, the sentence meted out to Di Pietro for his alleged contempt—imprisonment for only three days; the least severe of the punishments accorded to those defendants who were held in contempt—would seem to reflect even the trial judge's own judgment, from the vantage point of a wholly completed trial, and despite the obvious bias which he displayed, that Di Pietro had not, by his acts or connivance, contributed to the ob-

struction of justice. At the time of sentence, the court said (Tr. 9,060):

> "In sentencing you to only three days, I am mindful of the extreme provocation."

This finding of "provocation" is certainly antithetical to any idea that Di Pietro had welcomed, or conspired to bring about, the outbursts so deleterious to his defense, and so prejudicial to his rights to a fair trial.

Where error is claimed as a result of the actions of a co-defendant being tried in a mass conspiracy trial, fairness and simple justice require that a trial court should determine, from evidence, whether an individual defendant claiming error did himself conspire to create, or contribute in some manner to the wrongful conduct which caused prejudice to him, of which he complains. In the case of this "second conspiracy", or "implied conspiracy", however, no less than in the case of the primary underlying conspiracy charged in the indictment, a defendant should have a right to have the fact question of his individual guilt of contempt determined on evidence, with the right to confront the witnesses against him, and all the other safeguards surrounding the determination of fact questions in criminal contempt cases.

To be sure, the determination of "guilt" in the "implied conspiracy" may often involve great, or even insuperable, difficulty. Nevertheless, the inherent difficulty of determining "guilt" in the "implied conspiracy" cannot be used to justify an abandonment of the fundamental principles governing the trial of contempt cases. It stands rather as a warning against any easy assumption of common guilt by association, and it imposes upon this Court a higher duty to "use * * * every safeguard to individualize each defendant in relation to the mass." (*Kotteakos* v. *United States*, 328 U. S. 750, 773, *supra.*) The expressed worry of the

Second Circuit as to the ease of causing mistrials if individual proof of guilt of contempt is required would seem to reveal an unwholesome concern about appearances, and a saddening willingness to eschew substance.

Is a completed trial, at any price, the desideratum? Or is it not rather a fair trial, and stern, prompt punishment, according to well-understood rules, for those who prevent a fair trial?

Surely if the issue posed by this case were to come before this Court on appeal from a judgment of conviction after trial on an indictment for a conspiracy to obstruct justice, or a conviction for contempt of court, the Court could only conclude that the evidence against Di Pietro was insufficient to sustain such a conviction; indeed, that no evidence whatsoever had been adduced to warrant such a result. It should do no less in the instant case, where the twenty-year punishment of Di Pietro resulted from a trial marred by contemptuous outrages committed by others.

4. The petitioner Di Pietro respectfully adopts each and every ground for granting certiorari submitted by his co-defendants, insofar as they may be applicable to his case.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for certiorari should be granted.

Respectfully submitted,

HARRIS B. STEINBERG, Esq.
Attorney for Petitioner

HARRIS B. STEINBERG
EDWARD J. BLOUSTEIN
Of Counsel

August, 1963.

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS.

FOR THE SECOND CIRCUIT

No. 237—October Term, 1962

(Argued January 30, 1963 Decided June 13, 1963)

Docket No. 27733

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM BENTVENA, CARLIE DI PIETRO, JOSEPH FERNANDEZ, CARMINE GALANTE, ANGELO LOICANO, FRANK MANCINO, ANTHONY MIRRA, SAMUEL MONASTERSKY, JOHN ORMENTO, CARMINE PANICO, SALVATORE PANICO, SALVATORE SCHIRAMMANO and WILLIAM STRUZZIERI,

Defendants-Appellants.

Before:

MOORE, SMITH and HAYS, *Circuit Judges.*

Appeals by thirteen appellants from judgments of conviction for violation of and a conspiracy to violate the

federal narcotics law, 21 U. S. C. §§ 173, 174, after a trial by jury before Lloyd F. MacMahon, Judge, in the United States District Court for the Southern District of New York. The judgments of conviction of Benfvena, Moraskovsky and Struzzieri on the substantive and conspiracy counts are reversed, and the substantive counts are remanded for a new trial; the judgment of conviction of Salvatore Panico on the conspiracy count is reversed and remanded for a new trial; the convictions of all other appellants are affirmed.

JONATHAN L. ROSNER and ARTHUR I. ROSETT, Assistant United States Attorneys (Robert M. Morgenthau, United States Attorney for the Southern District of New York, William M. Tendy and Arnold N. Enker, Assistant United States Attorneys, on the brief), *for the appellee.*

JEROME LEWIS, Brooklyn, N. Y., *for appellants, Bentvena, Carmine Panico, Salvatore Panico and Struzzieri.*

HARRIS B. STEINBERG, New York, N. Y., *for appellant, Di Pietro.*

NATHAN KESTENBAUM, New York, N. Y., *for appellant, Fernandez.*

O. JOHN ROGGE, New York, N. Y., and FRANCIS KAHN, New York, N. Y., *for appellant, Galante.*

ABRAHAM GLASSER, New York, N. Y., *for appellants, Loiacano* (Sylvester Cosentino, New York, N. Y., on the brief), and *Sciremammano*

Appendix A—Opinion of the Court of Appeals

(George Todaro, New York, N. Y., on the brief).

CONSTANTINE N. KATSORIS, New York, N. Y., *for appellant, Mancino.*

WILLIAM R. LUNEY, New York, N. Y., *for appellant, Mirra.*

RICHARD V. GIORDANO, New York, N. Y., *for appellant, Monastersky.*

JACOB KOSSMAN, Philadelphia, Penn., and ALBERT J. KRIEGER, New York, N. Y., *for appellant, Ormento.*

MOORE, *Circuit Judge:*

This is an appeal by thirteen defendants from their convictions for violations of the federal narcotics laws, 21 U. S. C. §§ 173, 174. The indictment, filed on May 5, 1960, contained eight counts, and named twenty-nine defendants. Counts one through seven charged various defendants with substantive violations; count eight charged all of those named with conspiracy to violate the narcotics law. The trial from which this appeal is prosecuted was the second trial on this indictment. The first trial, before Judge Levet and a jury, ended in the declaration of a mistrial after a trial of six months.

This retrial of fourteen of the defendants began before Judge MacMahon and a jury on April 2, 1962, on counts

four and five, charging sales of narcotic drugs, and count eight charging a conspiracy to import and distribute drugs.[1] On June 19, 1962, the trial court granted a motion for judgment of acquittal as to the defendant, Frank Mari, and on June 25, 1962, the jury returned a verdict of guilty as to the thirteen appellants on all counts in which they were named. Sentencing took place on July 10, 1962.[2]

Appellants, together with their co-defendants and co-conspirators, were charged with a conspiracy to import large amounts of narcotic drugs into the United States from Canada, and to dilute and distribute these drugs after their importation. The principal government witness, Edward Lawton Smith, and other government witnesses, described in some detail the workings of the conspiracy and the functional division of labor within the organization. In skeleton outline the conspiracy consisted of a group of Canadians, headed by Guiseppe "Pepe" Cotroni, who handled the exportation of the drugs from

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1 Count four named Orlandino, Struzzieri and Monastersky; count five named Monastersky, Bentvena and Struzzieri. Orlandino pleaded guilty at the beginning of the first trial. All appellants were named in count eight.

2 The following sentences were imposed: Bentvena—15 years on counts 5 and 8; Dipietro—20 years; Fernandez—35 years; Galante—20 years and $20,000; Loicano—20 years; Mancino—20 years; Mirra—20 years; Monastersky—30 years on counts 4, 5 and 8; Ormento—40 years and $20,000, Carmine Panico—12 years; Salvatore Panico—20 years; Sciremammano—12 years; Struzzieri—12 years on counts 4, 5 and 8. The sentences imposed on multiple counts are to run concurrently. Fernandez, Monastersky, and Ormento were sentenced as multiple offenders pursuant to 26 U. S. C. § 7237(c).

Canada. Couriers brought the narcotics across the Canadian-United States border and into the New York metropolitan area. Members of the conspiracy manned centers in the New York metropolitan area where they received the drugs from the couriers and diluted and packaged them. Distributors finally disposed of the drugs through various selling outlets. Overall responsibility for the continuing operation rested in its "chief executive", the appellant Carmine Galante.

THE CONSPIRACY

The April 1957 Montreal Meeting and Narcotics Importation

In late April 1957, Smith, a Canadian with underworld connections, met the appellant Mancino in Montreal. Mancino asked Smith to make a "run" into New York with him and Smith agreed. The following day Mancino took Smith to an apartment in Montreal where they met the appellant Galante, the severed defendants Giglio and Stepanoff, and Frank Cotroni, Vic Cotroni, and a person identified only as "Angelo". Galante picked up a valise, put it on the coffee table, and opened it. Manciano examined its contents, which were clear plastic bags containing a white powder. As Smith and Mancino were leaving with the valise, they encountered the severed defendants, Guiseppe "Pepe" Cotroni and Vecchio. Smith and Mancino drove to New York to Frank's Bar & Grill in Brooklyn where Mancino took the valise of narcotics and Smith returned to Montreal.

In late February or early March, 1958, Smith again came into New York City and drove to Frank's Bar & Grill where he met Mancino, Vecchio, and "Angelo". Mancino asked Smith if he would drive over to Manhattan and back. Smith agreed and Mancino picked up a package from Vecchio's car and directed Smith to the Vivere, a bar located on the lower east side. There Mancino left the car, rejoined Smith shortly, and they drove back to Brooklyn.

The "Route" Deliveries

During the ensuing months, Smith spoke with Mancino almost daily and there followed at weekly intervals a series of at least five "route" deliveries of narcotics throughout the Metropolitan area. On each of these occasions Smith met Mancino, Vecchio and "Angelo" at Frank's Bar & Grill in Brooklyn. Vecchio would remove a cardboard suitbox from the trunk of his car and give it to Mancino who would take it upstairs to his apartment and return in a few minutes carrying a valise. Prior to one "route" delivery, Smith accompanied Mancino to the latter's apartment with a suitbox and saw the nature of its contents, cellophane bags containing white powder. On this occasion, Smith saw Mancino wrap each of the bags in brown wrapping paper and mark them with the names of the "drops" along the route. Mancino then put the packages in a valise and an empty shoebox and he and Smith embarked on their route.

The first stop on the route was the Vivere. After the first delivery to the Vivere, Smith accompanied Mancino into the bar, where he observed Mancino put the valise on the table, take out a package and give it to DiPietro, who in turn gave it to the severed defendant Gellman.

The second stop on the run was the Squeez-Inn, a bar on East 4th Street in Manhattan. On at least three occasions, the package was given to appellant Scirematmano who carried it to the back of the bar. Another time the shoebox containing the narcotics was given to the defendant Polizanno[3] in the presence of the severed Canadian defendant Stepanoff.

The fourth stop[4] was the 1717 Club, a bar in Brooklyn operated by appellants Salvatore and Carmine Panico. There the package would be delivered to one of the brothers, both of whom would take it to the kitchen in the back of the bar.

After the stop at the 1717 Club, Smith would return with Mancino to Frank's Bar & Grill, where Smith would remain while Mancino made a delivery to "Rocco up on the Hill". Mancino later introduced the severed defendant Sancinella to Smith as "Rocco up on the Hill", and the appellant Angelo Loicano as "his partner, Puggy". In Loicano's presence, Sancinella asked Smith to make some runs from Canada for them. When Smith declined this offer, Loicano told him that he could make $100,000

3 Polizanno was severed between the first and second trials.

4 The third stop was a hotel in Coney Island. None of the persons there involved are defendants in this indictment.

to $140,000 a year in this work and that Smith should think it over.

In addition to these regular stops on the route, on three occasions Smith drove Mancino to a Manhattan hotel where packages were given to the severed defendant Indiviglio.

DiPietro and Mancino meet Cotroni in Canada

Because of a dispute over DiPietro's failure to make prompt payment in full to the Canadian group, DiPietro, late in April 1958, invited Smith to accompany him on a trip to Canada. A day or two later, Smith, DiPietro, Mancino, "Angelo," and one Frank Randazzo drove to Canada. In Montreal, Smith arranged a meeting between Cotroni, Giglio and DiPietro. After DiPietro paid Cotroni $17,000, Giglio informed DiPietro that he was now on a "pay as you go basis." On the following evening, Mancino, Randazzo, "Angelo" and Smith drove back to New York City with a load of narcotics and Smith and Mancino made deliveries to the Vivere, the Squeez Inn, the hotel in Coney Island, and the 1717 Club.

The Ormento Group

Between May 16 and May 21, 1958, at the Vivere, DiPietro introduced Smith to appellant Anthony Mirra. On the following evening at Mirra's request, Smith went to Johnny's Keyboard, a bar on Lexington Avenue between 56th and 57th Streets and there met Mirra, the severed defendant Petillo, and appellant Joseph Fernandez. During

the next few days, the four of them spent a great deal of time together. In late May 1958, Smith and Petillo drove to the lower east side to Jay's Bar on Houston Street, where Petillo introduced Smith to three men—"Angie", "Bootsie" and "Chalutz"—the severed defendants Angelo Tuminaro, Anthony DiPasqua and Charles Gagliadatto, respectively. During the meeting, "Angie" asked Smith to make "runs" from Canada for them and when Smith declined "Angie" guaranteed that he would make $140,000 a year in this line.

A few days later, Mirra and Smith went to a restaurant, Marino's, where they met appellant John Ormento, who also asked why Smith was turning down "these offers we have been making to you." In the early part of June, Smith again went to Jay's Bar with Petillo, where they met "Bootsie," "Angie" and "Chalutz." "Angie" again pressed him to make runs from Canada and when refused asked him about the trip he had made to Canada with DiPietro, and asked whether he had brought back a "load." When Smith agreed that he had done so, "Angie" said, "Who the hell do you think that was for?" As Smith and Petillo started to leave, Petillo picked up an envelope which he said "was his end" that he received every week.

A short time later, Mirra told Smith to go to Chickie James' Stable, a midtown night club operated by Mirra. There he was joined by Mirra and Fernandez. Mirra and Fernandez went to the rear of Fernandez's car where Fernandez took out an attache case which he gave to Mirra. Smith drove Mirra to the Saxony Restaurant on East 53rd Street. As Mirra was getting out of the car, Smith asked

what this was all about and Mirra opened the attache case revealing two cellophane bags containing a white powder, and said they were "making a run." When Mirra returned, he again opened up the case and showed Smith the contents, two bundles of money. They returned to the Stable where they met Fernandez and Petillo. Mirra gave the attache case to Petillo, who left the area in a taxicab.

During the second week in June, 1958, Smith and Mirra made a delivery of narcotics to Marconi's Restaurant at Ormento's behest. Sometime during the middle of June, Smith, Mirra, Petillo and Fernandez met in the basement of Chickie James' Stable and discussed the possibility of opening a new wholesale narcotics outlet. They concluded that with Smith's Canadian connection for narcotics, they could establish themselves and parted with the understanding that when all was set they would let Smith know. About a week later, Smith met with "Bootsie", "Angie", "Chalutz" and Petillo at Jay's Bar and was again urged to make trips to Canada for them.

Delivery from Galante to Ormento

Late in June 1958, Mirra, Smith and one Joseph Curtis drove to 56th Street and Sutton Place in Manhattan where Galante was standing on a corner. When they approached, Galante told Mirra that the "stuff" was in a nearby car. Mirra and Smith removed a suitcase from the rear of the car and Mirra gave it to Curtis, who put it in his car. Galante asked Mirra if he knew what to do, Mirra indicated that he did, and Galante gave Smith ten $100 bills. Mirra,

Smith and Curtis then drove to the Park Sheraton Hotel, where Smith and Mirra went upstairs. In one of the rooms they met Ormento and Vinnie Bruno, not a defendant in this case. Mirra threw the suitcase on the bed and Ormento opened it, revealing a number of cellophane bags with white powder.

On the 28th or 29th of June, Mirra, Petillo and Smith were arrested by local authorities. Upon their release, Smith was criticized by Mirra for not changing hotels and when Smith remained adamant, Mirra told him to make a change or he'd wind up behind a truck, because "if Carmine [Galante] gives the order, John [Ormento] will have to carry it out, and you are going to wind up being dragged behind the truck."

Seizures of Heroin and Other Evidence

On February 14, 1959, Narcotics Agents observed Marcantonio Orlandino drive to the residence of his brother and sister-in-law, Ann and Philip Orlandino. He entered the house and came out carrying a brown paper bag and drove to his place of employment in Jamaica. Shortly after noon he drove to the Railway Express Office in Jamaica and presented a parcel for shipment to "Eula I. Brown in Chicago", giving his name as Smith. The package arrived in Chicago, and on February 18 it was seized by agents of the Bureau of Narcotics. It contained approximately two kilograms of heroin.

Again on February 14, 1959, Narcotics Agents, together with local police, entered the residence of Ann and Philip

Orlandino and found approximately seventeen pounds of heroin, over $49,000 in cash, and paraphernalia utilized in the diluting, packaging and distribution of drugs. At the same time, other agents seized two packages which contained approximately a half kilogram of heroin from the desk used by Marcantonio Orlandino at his place of employment. Further out on Long Island, at the same time, other agents entered the residence of Marcantonio Orlandino and seized, *inter alia*, an address book in which appeared the inscription: "Ang Tumanaro 95-24 148 St. Ca 6-7518 Jamaica OL 7-5476".

In April 1959 other law enforcement officers were closing in on the center at the Vivere Lounge operated by DiPietro and Gellman. On April 27, Narcotics Agents followed Gellman to 19th Street and Second Avenue where he met DiPietro in a luncheonette. While there an agent overheard their conversation concerning an imminent sale of narcotics. DiPietro instructed Gellman to meet him "in front of the plant in exactly ten minutes." The agent followed Gellman to 226 East 18th Street where Gellman entered the building. When he came out he was carrying a brown paper bag which he gave to DiPietro who was waiting in front of the building. They parted and DiPietro entered a car which was parked across the street from the luncheonette, and drove away. They met again in a short time later and DiPietro was seen to hand Gellman some money.

On April 30 Gellman again entered the "plant" and emerged carrying a brown paper bag. He was apprehended by federal and state officers. The bag he was

carrying contained a quantity of heroin. A search of the apartment at 226 East 18th Street, which was used as the plant, uncovered a suitcase containing a quantity of heroin, packaging paraphernalia, and some empty plastic bags with traces of heroin.

Agent Biase and Smith as "Importers" and "Retailers"

In the middle of April 1959 Smith started to cooperate with the Bureau of Narcotics and, shortly thereafter, he introduced an undercover agent of the Bureau, Patrick Biase, to Mancino in an attempt to infiltrate the conspiracy. The Agent and Mancino discussed the possibility of Smith's and the Agent's opening a new wholesale outlet for narcotics, securing narcotics from the Cotroni organization in Canada. On April 27 Biase and Smith met Mancino and were told by Mancino that he had not yet gotten the "connection" they sought to take care of supplying them with drugs during a shortage between Canadian trips but said that he would see "Rocco" (Sancinella) about it. They parted with the understanding that Smith and the Agent would contact him upon their return from Canada.

Smith and Biase went to Canada and, on April 29, met "Pepe" Cotroni and the severed defendant Rene Robert. Smith told them that he and Biase were going to open a new wholesale outlet and wanted their aid. Cotroni gave them detailed instructions on the methods used to smuggle the narcotics across the Canadian-United

States border. He also asked Smith how "Angie" and "Bootsie" were. He told Smith that the narcotics seized from the Orlandinos belonged to "Bootsie" and "Angelo".

On May 21 Biase and Smith returned to Montreal and were reminded by Cotroni that it was his "stuff" that had been seized—"the ten kilos in Hicksville from Orlandino." He told them that "Angie" and "Bootsie" still owed him a substantial amount of money for the narcotics seized from Orlandino, but that he was not concerned since he could trust them. They remained in Montreal and on May 25 Cotroni told Biase and Smith that he had gotten a phone call from the people in New York and that "Angie" and "Bootsie" were not anxious for new competition. They agreed to avoid this problem by telling Mancino that they had a new connection for drugs in Florida. After arranging to communicate with Cotroni by telephone, Smith and Biase returned to New York where they met Mancino and, according to their plan with Cotroni, told him they were going to get the narcotics from a Florida connection.

On June 3, 1959, Biase and Smith returned to Montreal and met Cotroni and Robert. Biase gave Cotroni $13,800 for narcotics. Cotroni gave the money to Robert, who left the motel room, returning a short while later with two kilograms of heroin. Biase and Smith turned the narcotics over to agents of the Bureau of Narcotics and the Royal Canadian Mounted Police.

After several telephone calls from Cotroni, Smith and Biase returned to Montreal on June 17. Once again Cotroni and Robert met them at their motel and Biase gave $14,000 to Cotroni who promised delivery of the drugs later that

evening. In the early hours of June 18, while Cotroni, Biase and Smith were in the motel room, Robert entered carrying a cardboard box and a brown zipper bag which Biase had furnished. They contained approximately four kilograms of heroin. Cotroni opened the cardboard box and took out one of the plastic bags containing heroin, and indicated to Biase and Smith a point on the bag which had been punctured and then sealed with scotch tape. He told how this mark was made by him in his particular testing procedure and that it was a trademark, attesting that Cotroni himself had tested the narcotics and had found them to meet his high standards of purity. Cotroni said, "when you see that 'X' on the tape there, you'll know that the stuff belongs to me." After separating, Biase and Smith again turned the narcotics over to agents of the Bureau of Narcotics and the Royal Canadian Mounted Police.

A week later on June 24 Cotroni came to New York City with Robert and met Smith at the Edison Hotel. Smith introduced another undercover agent, Frank Dolce, as the "money man" of their business. After the meeting, Dolce and Smith drove Cotroni to the Vivere to find DiPietro. He was not there and Cotroni asked them to drop him at Mancino's residence in Brooklyn. The next day Smith and Dolce again met Cotroni and Dolce paid him part of some money due him for narcotics. Cotroni later told Smith that he wanted him "to bring back 12 kilos for Boots and Angie." On June 30 in Montreal Robert again advised Smith that Cotroni intended to utilize him to bring drugs back to New York City for the people there. On July 7, Biase and Smith met Cotroni and Robert to arrange

for a purchase. While driving around Montreal, Cotroni told them that he had six kilograms for them; and, if everything was all right, they would also take another fifteen kilograms to New York for Tumminaro and DiPasqua. Thereafter difficulties in consummating the transaction arose and officers of the Royal Canadian Mounted Police placed Cotroni and Robert under arrest.

Sometime during July or August, 1959, shortly after Cotroni's arrest, Mirra and Indiviglio, accompanied by another man, arrived at the Montreal residence of Suzanne Cadieux, Rene Robert's mistress. They sought the "cache" of drugs Cotroni had at the time he was arrested. After threatening Mlle. Cadieux to no avail, they departed without finding the narcotics.

Sufficiency of Proof as to the Conspiracy

There was abundant evidence that all appellants, except Bentvena, Monastersky and Struzzieri, were part of a conspiracy to import and deliver narcotic drugs. The evidence of knowing participation in the conspiracy by Galante, Mancino, DiPietro and Mirra is overwhelming. The testimoney of Smith not only placed Galante in the midst of the group importing the drugs but also shows him with physical possession of narcotics and direct knowledge and supervision of the importation. Smith's and Agent Biase's testimony establishes Mancino as a courier for the organization who smuggled the drugs into the United States and, with Smith, distributed the drugs on periodic "route" deliveries to wholesale centers in the New York metro-

politan area. DiPietro was described as the head of the center that operated from the Vivere. There was extensive testimony relating to DiPietro's trip to Montreal and the settlement of his financial difficulties with Cotroni. Smith's testimony concerning DiPietro was corroborated by substantial independent evidence. It was DiPietro who introduced Smith to Mirra. Mirra was a member of the group operating under Ormento in the east midtown area and was responsible for the physical handling of the narcotics for this group. Smith's testimony showed Mirra delivering narcotics from Galante to Ormento whom Mirra described as his "boss." Smith accompanied Mirra on a number of narcotics deliveries. Mirra's position in the organization was corroborated by the testimony of Cadieux.

Ormento contends that he was involved in "but two isolated transactions" with "no evidence of any narcotics or indeed of any possession of narcotics." However, on the occasion of the delivery of narcotics by Mirra to Ormento at the Park Sheraton Hotel, Mirra threw the suitcase on the bed and Ormento opened it, revealing a number of cellophane bags containing white powder. Galante had previously characterized the contents of the suitcase as "stuff". That the substance involved in this transaction was narcotics may, of course, be proved by circumstantial evidence. The evidence establishing the nature of the contents of the packages here involved was in all respects similar to that approved by this court in *United States* v. *Aquaci*, 310 F. 2d 817 (2d Cir. 1962). See, also, *United States* v. *Morello*, 250 F. 2d 631 (2d Cir. 1957); *Toliver* v. *United States*, 224 F. 2d 742 (9th Cir. 1955). Ormento is

in no position to invoke the isolated transaction rule. Aside from the evidence of Ormento's direct participation in this and the other narcotics transaction referred to previously, his statements to Smith concerning the latter's refusal to accept the several offers made to him clearly support an inference of knowledge of the existence of a vast organization dealing in Canadian narcotics.

Fernandez and Loicano similarly argue that the evidence against them is insufficient to establish knowing participation in a vast conspiracy and, at best, shows an isolated transaction. The isolated transaction rule

> "is not an arbitrary rule which is to be applied rigidly and without reason. It has been utilized to exonerate a defendant only when there is no independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and when the single transaction is not in itself one from which such knowledge might be inferred." *United States* v. *Agueci*, *supra*, at 836.

The evidence against Fernandez consisted first of his taking an attache case from his car and giving it to Mirra who delivered it to the Savoy Restaurant. This attache case contained two cellophane bags filled with white powder. Smith also testified that Fernandez had summoned Mirra and Petillo to a meeting called by Galante at Johnny's Keyboard. Finally, Smith testified that Fernandez took part in a discussion with Mirra, Petillo, and Smith concerning the importation and distribution of Canadian narcotics. At this meeting, Smith was asked if he had a strong connection with "Pepe" Cotroni and if he could get narcotics

from him. When Smith replied affirmatively, Petillo indicated that the other three could get the money that was needed and that they could open a new wholesale narcotics outlet.

A single act may be enough to draw a defendant within the ambit of a conspiracy. *United States* v. *Aviles*, 274 F. 2d 179 (2d Cir. 1959), cert. denied, 362 U. S. 974 (1960); *United States* v. *Carminati*, 247 F. 2d 640 (2d Cir.), cert. denied, 355 U. S. 883 (1957). Since, however, the crime of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent or the government must submit independent evidence that the defendant knew of the conspiracy and associated himself with it. *United States* v. *Aviles, supra; United States* v. *Reina*, 242 F. 2d 302 (2d Cir.), cert. denied, 354 U. S. 913 (1957); *United States* v. *Koch*, 113 F. 2d 982 (2d Cir. 1940). We find here, as we did in *United States* v. *Agueci, supra*, that there was independent evidence from which Fernandez' knowledge of, and desire to participate in, the overall conspiracy may be inferred. The conference at which the opening of a new wholesale outlet being supplied from Canada was discussed demonstrates Fernandez' knowledge of the existing conspiracy and his desire to participate in a new phase of that conspiracy. Appellant's contention that this discussion related to the formation of a new conspiracy and not a new participation in the old is not well founded. A conspiracy, once established, is presumed to continue until the contrary is demonstrated, *United States* v. *Stromberg*, 268 F. 2d 256 (2d Cir.), cert. denied, 361 U. S. 863 (1955),

and cases cited therein. Further, a conspiracy of this kind is, by its very nature, constantly expanding. The outlet contemplated at this meeting would have become just one more "drop" in the scheme of distribution. In any event, the contemplated formation of a new outlet presupposes the existence of old ones and is sufficiently probative of Fernandez's knowledge of the overall conspiracy to warrant a conviction for conspiracy. As we said in *United States* v. *Aviles, supra*, at 190:

> "From evidence of knowledge of the conspiracy and a transaction with one of its members it would be reasonable to infer intent to participate in it."

Loicano was introduced to Smith as a "partner" of "Rocco, up on the hill" (Sancinella) in Sancinella's presence. At this meeting at a bar in Brooklyn, Sancinella asked Smith if he would be willing to "make some runs back and forth to Canada for him and his partner Puggy (Loicano)." When Smith declined the offer, it was Loicano who suggested that he could make $100,000 to $140,000 a year as a courier and told Smith to think it over. Smith testified that a number of deliveries were made to Sancinella. Loicano contends that the conversation with Smith was not in furtherance of the conspiracy charged but was an attempt to form a new conspiracy. We disagree. Sancinella and Loicano were engaged in an effort to recruit Smith as a courier to carry narcotics from Canada. They sought to have him join the existing conspiracy as an integral part of it and not to go into competition with the old conspiracy. This is made abundantly clear by Mancino's efforts on behalf of Sancinella and Loicano to employ Smith.

Mancino was the strong thread running through this entire conspiracy. This evidence against Loicano demonstrates the requisite knowledge of the conspiracy and a transaction with its members from which it would be reasonable to infer an intent to participate in it.

Carmine and Salvatore Panico and Sciremammano also contend that there is insufficient evidence to establish their knowing participation in the conspiracy. The evidence showed that these three appellants were repeated recipients of packages on Mancino's route deliveries. While no conversations with Sciremammano illuminate his actions in repeatedly receiving packages of narcotics from Mancino and taking them to the back of the bar, this receipt of a quantity of narcotics repeated at least three times, is sufficient evidence from which a jury might reasonably conclude that the participant was aware of the existence of a larger scheme.

Like Sciremammano, the Panicos were recipients of packages of drugs at their "place of business," the 1717 Club, but unlike Sciremammano, their activities were amplified by conversations, as well as evidence of acts which clarify their knowledge of the conspiracy. Smith testified that Salvatore Panico was waiting on the sidewalk for Mancino and Smith on a number of occasions that packages of narcotics were delivered to the 1717 Club. From this evidence it might be inferred that he was there by prearrangement, with knowledge of the existence of a larger scheme in which he was participating. His actions in removing one of the packages from the valise in Smith's car on one delivery, and his admonition not to argue while

they had "stuff" supports the inference. Carmine Panico participated in the receipt of the package from Mancino on each occasion and accompanied his brother into the kitchen with it. In addition, he told Smith and Mancino to do their "arguing some other place, some other time, not when you're making a run." The evidence as to his own independent actions and statements fully supports the jury's conclusion that he knowingly participated in the overall scheme.

The Errors Asserted

There remain for consideration those claims of error which affect all of several of the appellants.

I

A. *The Atmosphere of the Trial.*

All appellants complain that the atmosphere of the trial below rendered impossible that objective and unprejudiced hearing to which they were entitled. Specifically, they contend that the "mass conspiracy" trial, the outbursts and conduct of some defendants, the comments and actions of the trial judge, and the publicity attending the trial denied them the fundamental fairness required by due process. To appreciate fully the nature of these contentions, and to put the incidents referred to in their proper setting, we must start with the first trial and its abortive ending.

The first trial of this indictment began on November 21, 1960, after a number of delays, including a one-week postponement occasioned by the flight of the defendant Tuminaro on the eve of trial. It proceeded along its rocky road for six months over every conceivable type of obstruction and interruption. On May 15, 1961, the eve of summations, it ground to a halt after the foreman of the jury broke his back in an unexplained fall down a flight of stairs in an abandoned building in the middle of the night. No alternate jurors (four had been originally empanelled) remained and a mistrial was declared. As this court has already had occasion to consider the misadventures in the first trial and the misconduct of the defendants which resulted in their remand and in contempt actions against some of them, they will not be fully catalogued here.[5]

At the conclusion of the first trial, the defendants were enlarged on bail and, with the court's permission, various attorneys from the first trial were discharged from their representations. The case appeared at regular monthly intervals on the trial calendar beginning June 19, 1961. On each occasion it was adjourned because a number of the defendants said that they had been unable to retain counsel notwithstanding their ability to raise substantial bail. As early as July 31, 1961, Judge Murphy sensed "that the failure to retain counsel was part of a plan to postpone trial." Despite efforts of the court and threats of contempt proceedings, it was not until March

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5 *See United States v. Bentvena*, 288 F. 2d 442 (2d Cir.), aff'd *sub nom., Fernandez v. United States*, 81 Sup. Ct. 642, 5 L. Ed. 2d 683 (1961); *United States v. Gaunte*, 298 F. 2d 72 (2d Cir. 1962).

9, 1962, that all defendants who had not been severed on the government's motion had counsel, either retained or appointed by the court. After further delays and substitutions of counsel (to be treated more fully below), the trial began on April 2.

During the polling of jurors on this opening day of trial, the first outburst by Salvatore Panico occurred. This incident was a precursor of events to come. Similar outbursts by Panico and other defendants[6] became commonplace. On one occasion Panico climbed into the jury box, walked along the inside of the rail from one end of the box to the other, pushing the jurors in the front row and screaming vilifications at them, the judge, and the other defendants. On another occasion, while the defendant Mirra was being cross-examined by the Assistant United States Attorney, Mirra picked up the witness chair and hurled it at the Assistant. The chair narrowly missed its target but struck the jury box and shattered. The trial judge responded to these outbursts by having the perpetrators gagged and shackled. We have described only two of the more dramatic disturbances which plagued the trial of this case for we find it neither necessary nor judicious to publicize or preserve the vile language and rebellious conduct that characterized this trial. Suffice it to say that more abhorrent conduct in a federal court and before a federal judge would be difficult to conceive.

In addition to the courtroom conduct of the defendants they engaged in a series of off-stage activities designed

6 Eleven defendants were punished for contempt for their behavior during trial.

to delay and prolong the trial.[7] On April 16, the defendant Sciremammano fell or tripped down two stairs at the Federal Detention Headquarters. Because of this, no testimony was taken on April 16 or on the morning of the 17th in order to permit a physician to examine Sciremammano, first in the Courthouse and then in a hospital. No objective signs of injury were found. The physician stated that in his opinion Sciremammano was feigning his "agony" Nonetheless, he refused to come to court and, when brought in a wheelchair, insisted that he was too sick to continue. No testimony was taken on the afternoon of April 18 because of the illness of the defendant Struzzieri. Mirra and Salvatore Panico, on one occasion, claimed that they had been drugged and were unable to remember what had transpired in the courtroom. In the early hours of June 7 Salvatore Panico was found by a correction officer at Detention Headquarters hanging by a belt in a cell which he occupied with his brother and another prisoner. Thus, the opening of court was delayed. Panico was unharmed and was able to continue the trial later that day. A court-appointed psychiatrist noted with reference to this incident, "the ostensible attempt at self-hanging occurred under circumstances justifying suspicion" as to its genuineness. The following morning, in the shower room, while preparing to come to court, and with his brother and other prisoners in the room, Salvatore Panico made 14 widely-spaced shallow cuts on his forearm between the elbow and wrist. Panico's wounds were sutured with

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7 The first trial was bedeviled by similar "illnesses" of the defendants. *See United States* v. *Bentvena*, *supra*, at 445-46.

little loss of blood. On Monday, June 11, Monastersky's attorney informed the court that his client had fallen in the shower and had injured his arm. As with the others above-mentioned, it was asserted that Monastersky was so affected by the medication he received (an aspirin-like compound) that he was groggy and unable to follow the proceedings. Monastersky's symptoms are claimed to have persisted during the remainder of the week.

All appellants, even the perpetrators, complain of the prejudicial effect of the outbursts of the defendants. They claim that this prejudice was accentuated by the nature of the trial itself, that is, a mass conspiracy trial in which fourteen defendants were tried together. They contend that the rulings of the trial judge, in failing to declare a mistrial or sever the unruly defendants, and in ordering some of the defendants gagged and shackled and ordering an increased number of marshals to be present in the courtroom, constituted reversible error. We find no abuse of discretion in the trial judge's actions taken to preserve the security of the courtroom. If any one distinct impression is gained from a scrutiny of the record here, it is that the trial judge was justified, indeed was forced, to resort to stern measures to obtain order in his courtroom.

As to his failure to sever certain defendants and to declare a mistrial after these outbursts, we look to our recent decision in *United States* v. *Aviles*, *supra*. There, as here, a defendant burst into a tirade before the jury accusing his co-defendants. There, as here, the trial judge promptly instructed the jury to disregard the outbursts. We said, in answer to the contention that reversal was required:

> "Manifestly it was not error to deny the mistrial motions. If such conduct by a co-defendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so. Under all the circumstances the trial judge's instructions adequately dealt with the situation and his denial of the mistrial motions was proper." *Id.* at 193.

This case differs from *Acides* only in that the outbursts of the defendants were more numerous and more offensive. But the trial judge instructed the jury to ignore the outbursts each time they occurred. This is all that he could do apart from taking steps to prevent their repetition. We have satisfied ourselves that the prosecution did not provoke the incidents. The judge did all in his power to minimize their effect, and we find no ground for reversal in the circumstances. Any other answer to these contentions would produce little less than anarchy.

Appellants also seize upon the concern expressed in our recent decision of *United States v. Aquecci, supra*, over the problems inherent in the trial of a mass conspiracy case. Their claim, apparently, is that if this were not a multi-defendant trial, the prejudice engendered by one defendant's outburst could not accrue to the detriment of other defendants for the simple reason that they would not be there. In addition, they assert that if only two or three defendants were on trial, the chance that these disturbances would occur would be lessened.

law enforcement and fair trial for those accused of violations is not to be limited to the pattern chosen by defendants. The administration of criminal justice in the federal courts will not be delivered into the hands of those who could gain only from it subversion. Our decision in *Wiles* is as applicable to a trial of two defendants as it is to a trial of fourteen. It may take two to conspire but it takes only one to throw a chair at a prosecutor.

Appellants claim that the trial judge should have severed each offending defendant after an outburst. Why this course of action was required we fail to see. After the incident had occurred, severance would not have protected the remaining defendants from any possible prejudice. It would simply have afforded each defendant an easy escape from the trial. Appellants insist, however, that Salvatore Panico should have been severed because even if he were competent to stand trial, he was so mentally ill during the trial that his continued presence and conduct prejudiced the rights of the other defendants to a fair trial. Their claim is that even if prejudice resulting from the outbursts could not have been erased, the judge was obligated to sever Salvatore Panico after it became apparent that he could not control himself and that other outbursts could be forthcoming.

Rule 14 of the Federal Rules of Criminal Procedure[8] provides for the exercise of discretion by the trial judge as

[8] "Rule 14. Relief from Prejudicial Joinder.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

to whether, at any point in the trial, there appears to be a possibility of sufficient prejudice to any defendant to warrant a severance. *United States* v. *Schaffer*, 362 U. S. 511 (1959); *Opper* v. *United States*, 348 U. S. 84 (1954); and the exercise of this discretion will be corrected only if abused. *Dowling* v. *United States*, 249 F. 2d 746 (5th Cir. 1957); *United States* v. *Haupt*, 136 F. 2d 661 (7th Cir. 1943). We have recently had before us the contention that Salvatore Panico could not be punished for contempt because he "was too mentally ill to formulate the intent to be contumacious." *United States* v. *Panico*, 308 F. 2d 125 (2d Cir. 1962). We there quoted at length from the trial judge's certificate filed pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure and concluded as follows:

> "We do not think that the conclusion of Judge MacMahon with respect to the deliberate and calculated nature of defendant's acts constituted reversible error." *Id.* at 127.

Accepting that conclusion here, little remains of appellants' claims that the trial judge abused his discretion in failing to sever Panico. The trial judge found, from his own extensive observation of Panico, and from the reports of psychiatrists that examined him, that Panico's acts were deliberate and calculated to disrupt the trial. This being so, he stands in no different position than the other unruly defendants and, as we have said, there was no abuse of discretion in refusing to grant a severance because of their actions.

All appellants also contend that the trial judge's attitude towards the defendants and their counsel, as revealed by his comments and rulings, prejudiced the jury against them. To support these claims, appellants direct our attention to isolated incidents, invariably taken out of context, and ask us to conclude therefrom that the trial judge abandoned his proper sense of impartiality and placed the weight of his position on the side of the prosecution.

The trial judge, in his attempt to bring this case to trial and to see it brought to an orderly and expeditious conclusion, was presented with a host of problems calling for the exercise of his discretion. Having the experience of the first trial before him, he had to make certain that the trial proceeded with reasonable dispatch and, at the same time, guarantee that all steps be taken to safeguard the rights of the defendants. In view of the unprecedented tactics employed to impede the continuance and resolution of this trial, we find that the actions and rulings of the trial judge were reasonable and often necessary to prevent the frustration of justice.

Appellants strenuously urge upon us two incidents in particular that are alleged to typify the trial judge's attitude. The first concerns the identification of Struzzieri by a government agent.[9] When the Agent was asked to do so by the prosecutor on direct examination, he identified Struzzieri as the one "with the gray suit, he has a black tie on." Struzzieri, in fact, had a gray suit and white tie on. When defense counsel called attention to this fact, the judge had

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9 This incident has been considered by this court once before. See *United States* v. *DiPietro*, 302 F. 2d 612 (2d Cir. 1962).

the witness step down and touch the defendant he identified as Struzzieri. He identified the right man. Defense counsel then asked the judge to put a description of the clothing worn by Struzzieri in the record. The judge responded:

> "The Court has already indicated what happened. I will simply say that Struzzieri does not have on a black tie. He does have on a dark gray suit. I also say for the record that there was no doubt in the Court's mind who was identified. It will be for the jury to decide, however."

Appellants contend that this was an unwarranted intrusion by the trial judge into the province of the jury and that it exemplified the judge's partial attitude. The facts do not justify appellants' conclusion.

At a pretrial conference, the trial judge asked defense counsel to devise a seating arrangement for themselves and for the defendants and he informed them that he would agree to anything reasonable. Defense counsel asked to be able to shift the defendants around as they saw fit. The trial judge refused this request on the ground that it would create disorder but agreed to an arrangement whereby the defendants would sit behind their respective counsel. Some time just before the incident in question, DiPietro left the seat he ordinarily occupied and took a seat immediately to Struzzieri's left. DiPietro was dressed in a light gray suit and wore a black necktie. The shades of Struzzieri's dress were just the opposite; he wore a dark gray suit and a white tie. Up to this point in the trial, each time a witness was asked to identify a defendant, that defendant stood up, either at the direction of his counsel or without being asked,

before the identification took place. The witness involved in this incident was asked to identify both Bentvena and Struzzieri. Bentvena stood up and the witness identified him; Struzzieri stood up and the witness identified him but remarked that he had a black tie on. Defense counsel, who had their backs to both DiPietro and Struzzieri, wheeled around and asserted that the witness had identified DiPietro. The trial judge concluded that the defendants had engaged in a pre-arranged attempt either to confuse the witness or mislead the jury. On the basis of the facts of record set out above, and our own detachment from the atmosphere of these proceedings, we can neither say that he was wrong in his conclusions nor that his statements made in the presence of the jury were improper.

The second incident concerns the trial judge's characterization, in the presence of the jury, of certain outbursts by defendants as "a put-up job." On the morning of May 25, 1961 shortly after the first witness of the day had assumed the stand, the following occurred:

> Defendant Salvatore Panico: DiPietro is talking about me there. He is the convicted dope pusher. Separate me from him."
>
> Defendant DiPietro: "Stop him. I told you, Al."
>
> Mr. Krieger: "I move for a mistrial as far as DiPietro is concerned."
>
> (Deputy marshals escort Salvatore Panico from the courtroom.)
>
> * * *
>
> The Court: "Your motion for a mistrial is denied, Mr. Krieger. It is obviously a put-up job."

It should not be the function of an appellate court with all the advantages of hindsight to substitute itself for the trial judge and to declare how it might have handled each situation or to deliver lengthy admonitions to trial judges on the proprieties of conducting these difficult criminal trials and the need to avoid embroilment with defendants and defense counsel despite the kind of provocation evident here. This was but one incident in a trial that lasted almost three months. It was not, as appellants contend, an indication of the hostility of the trial judge toward the defendants and their counsel. We have described sufficiently the outrageous conduct of the defendants at this trial. We find that the trial judge, notwithstanding this harassment, maintained an impartial attitude and did all in his power to safeguard the rights of the defendants and to minimize the effects of these outbarsts. After the incident in question, as after all similar disturbances, the judge instructed the jury to ignore it. We find no ground for resersal here.

B. *Newspaper Publicity*

During the course of the trial, certain articles appeared in the New York newspapers specifically referring to the trial and some of the defendants. These articles called attention to the reason for the declaration of a mistrial in the first trial and described some of the defendants as "delegates to the 1957 underworld convention in Apalachin" and as linked to "the Mafia." Upon being advised of the contents of these articles, the trial judge conducted a number of "*voir dires*" of the jury. No juror had read any

of the articles. One juror indicated that his wife, in an effort to find out what case he was sitting on, showed him two newspaper articles. He glanced at one long enough to realize that if was about this case and then put in aside and refused to discuss it further with her. He gave every assurance that the article had not prejudiced him. The judge, nevertheless, discharged him from the jury.

After each *voir dire* and before each day's recess, with one exception, the judge cautioned the jurors against reading anything that related to this trial or to narcotics generally and to refrain from discussing the case with anyone. In addition, the trial judge had the United States Attorney write to all New York publishers requesting that they avoid publishing articles related to the case. This request was complied with until the misconduct of the defendants reached such violent and bizarre extremes that the voluntary ban was lifted by the press. Even then, only one article appeared that discussed the happenings of the trial. It is evident from the record here that the trial judge was extremely sensitive to the problems raised by adverse newspaper publicity.[10] He took every precaution possible to prevent the publication of prejudicial articles and repeatedly admonished the jury to avoid contact with any such publicity.

"The crux of the matter is whether the statements were so prejudicial as to require the trial judge, who has large discretion in such matters, * * * to empanel a new jury."

10 The transcripts of all hearings relating to newspaper publicity were ordered sealed by the trial judge to safeguard further the rights of the defendants.

United States v. *Feldman*, 299 F. 2d 914, 917 (2d Cir. 1962). Here there was no showing that any juror came into contact with such matter, nor was there, of course, any showing that a juror could not serve in a fair and impartial manner. That, coupled with the affirmative action taken by the Government and the trial court's continuing efforts to secure a fair and impartial jury, clearly compel the conclusion that appellants suffered no prejudice. *United States* v. *Agueci*, *supra*; *United States* v. *Leviton*, 193 F. 2d 848 (2d Cir. 1951), cert. denied, 343 U. S. 946 (1952).

C. *Denial of Right to Counsel—Adequacy of Time to Prepare for Trial*

A number of appellants contend that they were denied the effective assistance of counsel by the trial judge's refusal to postpone commencement of the trial so that defense counsel could adequately prepare. At a pretrial conference held on March 9, 1962, the trial judge set the case for trial on March 19th. One of the assigned counsel had been appointed as recently as March 2nd. In rejecting applications for adjournment, the trial judge explained that the case had been tried once before, that they were in the advantageous position of having the Government's case set out in the record, and that the facts of the case could easily be mastered by the date set for trial. On March 16th at another pretrial conference, the trial court relieved Mancino's counsel of his assignment because of health and substituted another attorney, adjourning the trial for two weeks to enable the newly assigned counsel to prepare. The trial judge was of the opinion, in view of the assur-

ance given by the new attorney's firm that he would be given sufficient assistance, that he could be prepared by April 2nd.

The disposition of a request for continuance rests in the discretion of the trial judge and the exercise of that discretion will not be disturbed unless a clear abuse is shown. See, *e.g.*, *Avery* v. *Alabama*, 308 U. S. 444 (1940); *Johnson* v. *United States*, 291 F. 2d 150 (8th Cir. 1961), cert. denied, 368 U. S. 880 (1961); *Torres* v. *United States*, 270 F. 2d 252 (9th Cir. 1959), cert. denied, 362 U. S. 921 (1960); *Bunn* v. *United States*, 260 F. 2d 313 (8th Cir. 1958); *Thomas* v. *United States*, 252 F. 2d 182 (9th Cir. 1958); *United States* v. *Kelley*, 186 F. 2d 598 (7th Cir.), cert. denied, 341 U. S. 954 (1951); *United States* v. *Wright*, 176 F. 2d 376 (2d Cir. 1949), cert. denied, 338 U. S. 950 (1950). The test here is whether the lack of effective assistance of counsel was such "as to shock the conscience of the Court and to make the proceedings a farce and mockery of justice." *United States* v. *Wright*, *supra*, at 379; *Avery* v. *Alabama*, *supra*, at 450. And the "time consumed in oral discussion and legal research is not the crucial test. * * * The proof of the efficiency * * * lies in the character of the resultant proceedings." *United States* v. *Wright*, *supra*, at 379.

We find no abuse of discretion here. We have already referred to the difficulties experienced in bringing this case to trial a second time. The defendants and the government had grave interests at stake in seeing that further procrastination be avoided and that the trial be commenced without delay. The trial court was authorized, indeed was required, to take whatever reasonable steps he could to effectuate those ends. His action, in set-

ting the case peremptorily against both sides and directing that the trial begin on April 2nd, was such a reasonable step. The contention that it was an abuse of discretion is belied by the zeal and quality of the performance rendered by defense counsel at trial and before this court.

1. *The Panicos and Loicano*

Carmine and Salvatore Panico and Angelo Loicano contend that they were deprived of adequate and effective counsel and were denied their constitutional right to be represented by counsel of their own choosing. On September 5, 1961, Albert C. Aronne, Esq., filed notices of appearance for both Panicos. Mr. Aronne was not present at the first pretrial conference held on March 9th, but did appear for the second conference on March 12th. He there moved to withdraw his appearance asserting that it was never intended that he would try the case because the Panicos did not want him as trial counsel; that he was not familiar with the procedure in the federal courts and that he had not been paid. The trial court denied the motion on the ground that it came too late. In the afternoon of March 20th, three days before trial, Mr. Aronne informed the trial court that he had been ordered to trial in a state court and would be detained there for about a week. On October 23, 1961, Sylvester Cosentino, Esq., filed a notice of appearance on behalf of Loicano. In the first morning of trial, Mr. Cosentino did not appear and it was found that he was in the hospital.

Thus, on the first day of trial, there were three defendants who did not have counsel in court. In an attempt to

proceed with the trial, the judge requested that other counsel cover for the missing attorneys until they returned and that the defendants agree to such coverage. Neither request met with any success, the Panicos now deriving comfort only from Mr. Aronne's representation.

Defense counsel on this first morning were also in the process of substituting counsel for a number of defendants. When all the switches had been made, George Todaro, Esq., ended up relieved of his representation of other clients. The trial court assigned him to represent the two Panicos and Loicano until such time as their retained counsel returned or they obtained other counsel.[11] Later, the court directed the prosecution not to put in evidence directly relating to these defendants until their retained counsel returned. Accordingly, the testimony through April 11th dealt primarily with the substantive counts and did not directly involve the Panicos or Loicano. Mr. Aronne returned on April 11th and the Judge afforded him an opportunity to review the existing trial record and make any motions on behalf of the Panicos, or recall any witnesses for further cross-examination. He also offered Mr. Aronne the opportunity to make an opening address on behalf of the Panicos after the Government rested, despite their explicit waiver of an opening. Mr. Cosentino returned on April 16th and the same opportunities were made available to him. From April 11th, when testimony concerning Loicano began, to April 16th, Mr. Todaro was representing only Loicano.

11 This appointment was challenged in a mandamus proceeding before this court. The writ was denied. *Loicano* v. *MacMahon*, 2d Cir. Docket No. 27487, April 4, 1962.

These three appellants claim that the trial judge, by proceeding with the trial while their retained counsel were absent and by appointing Mr. Todaro to represent all three on an interim basis, deprived them of the effective assistance of counsel and the right to counsel of their own choice.

A defendant in a federal court is, of course, entitled under the Sixth Amendment to the assistance of counsel for his defense, *Johnson v. Zerbst*, 304 U. S. 458 (1938), and where he is able to obtain counsel for himself he must be given a reasonable time and a fair opportunity to secure counsel of his own choosing. *Crooker* v. *Chandler*, 357 U. S. 433 (1958); *Chandler* v. *Fretag*, 348 U. S. 3 (1954). An accused's right to select his own counsel, however, cannot be insisted upon or manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. *United States* v. *Terranova*, 309 F. 2d 365 (2d Cir. 1962); *United States* v. *Arlen*, 252 F. 2d 491 (2d Cir. 1958); *United States* v. *Paccione*, 224 F. 2d 801 (2d Cir.), cert. denied, 350 U. S. 896 (1955); *United States* v. *Mitchell*, 138 F. 2d 831 (2d Cir. 1943), cert. denied, 321 U. S. 794 (1944). Thus, if a defendant does not give the court adequate notice that his retained counsel will be unable to attend the trial, the trial court may, in the exercise of its sound discretion, do what is reasonably necessary to meet the situation. And where the inability of retained counsel to serve gives promise of unreasonable delay or inconvenience in completing the trial, the court may require the defendant to secure other counsel. *Releford* v. *United States*, 288 F. 2d 298 (9th

Cir. 1961); *Lee* v. *United States*, 235 F. 2d 219 (D. C. Cir. 1956); *Smith* v. *United States*, 288 Fed. 259 (D. C. Cir. 1923).

We find that the judge acted reasonably in the circumstances. The delay that would have been caused by acceding to the Panicos' vacillating desire to have Mr. Aronne represent them at trial, and Loicano's insistence on Mr. Cosentino's services despite the knowledge of his heart condition and the fact that this condition had caused repeated motions for adjournments in the first trial is precisely the kind of obstruction which the right to counsel of one's own choice must not be allowed to produce. These appellants refused to obtain other counsel and rejected the court's attempt to obtain coverage from the other defense counsel. They demanded that the court close its doors until they and their counsel were ready for trial. One with a bent for statistics would find, no doubt, that if this trial were continued on every occasion that one or more of the defendants or their counsel so requested the trial would still be in progress. This disruption of the court's business and tampering with the rights of the other defendants and the government cannot be tolerated. See *United States* v. *Mitchell*, *supra*. The steps taken by the court during retained counsel's absence and the opportunities made available to them on their return fully protected the rights of these appellants.

These three appellants, relying on *Glasser* v. *United States*, 315 U. S. 60 (1942), also contend that the appointment of Mr. Todaro to represent all three denied them the effective assistance of counsel. This claim is baseless.

As the Supreme Court recognized in *Glasser*, and as the circuits have recognized since that case was decided, an appellant must show some conflict of interest between himself and the other defendants represented by his attorney before he can claim successfully that the joint representation deprived him of his right to counsel. See *Wynn* v. *United States*, 275 F. 2d 648 (D. C. Cir. 1960); *Lebron* v. *United States*, 229 F. 2d 16 (D. C. Cir. 1955), cert. denied, 351 U. S. 974 (1956); *Lott* v. *United States*, 218 F. 2d 675 (5th Cir. 1955); *Sanders* v. *United States*, 183 F. 2d 748 (4th Cir. 1950), cert. denied, 340 U. S. 921 (1951); *United States* v. *Dennis*, 183 F. 2d 201 (2d Cir. 1950), aff'd 341 U. S. 494, rehearing denied, 342 U. S. 842 (1951); *Kennedy* v. *Sanford*, 166 F. 2d 568 (3th Cir.), cert. denied, 333 U. S. 864 (1948); *Selser* v. *Welch*, 159 F. 2d 703 (4th Cir.), cert. denied, 331 U. S. 840 (1947); *Farris* v. *Hunter*, 144 F. 2d 63 (10th Cir. 1944). As noted above, Mr. Todaro represented these three appellants during a part of the trial in which no significant evidence was introduced against any of them. In compliance with the court's instructions, the prosecution put in evidence relating only to the substantive counts in which none of them were named. No conflict of interest is pointed to by appellants and none is apparent to us.

2. *Galante*

On September 5, 1961, Nicholas P. Iannuzzi, Esq., filed a notice of appearance for Galante. On the first afternoon of trial he sought to withdraw in favor of Miss Frances Kahn, who told the court that she had been retained some

three weeks earlier but had not had the opportunity to so advise the court. The trial judge permitted Miss Kahn to appear as co-counsel and conduct the defense but explicitly refused to relieve Mr. Iannuzzi of his representation. On June 12, Miss Kahn suffered one of the injuries that plagued defense counsel during the trial of the case. No proceedings were held on this day and the court summoned Mr. Iannuzzi to appear. Galante was afforded an opportunity to obtain other counsel if he so desired. During the remainder of the week, Galante refused Mr. Iannuzzi's assistance. On June 18th Mr. Iannuzzi turned himself into the hospital. Doctors appointed by the court to determine the physical conditions of Miss Kahn and Mr. Iannuzzi could find no objective symptoms of injury or illness. The court called in Kenneth O'Connor, Esq., to whom Galante had spoken the previous week about representing him and assigned him to represent Galante. Galante objected to this assignment, objected to representing himself, and failed to get other counsel. Galante's claim that he was denied the effective assistance of counsel of his own choice is sufficiently answered by what we said in relation to the similar claims of the Panicos and Loiacano. The happenings below demonstrate quite forcefully why the courts have had occasion to say that the right to counsel cannot be manipulated so as to interfere with the fair administration of justice. The trial court's conclusion that manipulation was afoot is not so devoid of basis as to require reversal.

3. *Mirra*

Mirra contends that he was denied the right to act as his own counsel by the trial court's denial of his request to

discharge his defense counsel and conduct the cross-
nation of, the chief government witness, Smith, h
Mirra had been represented with great skill throughc
trial by appointed counsel. Mirra indicated no dissa
tion with his counsel and apparently relied solely
right to represent himself. One charged with crim
an absolute right to do without an attorney and c
his own defense (28 U. S. C., § 1654), but that is
different from the right to discharge counsel afte
has begun. This latter right is a qualified one.
States ex rel. Hyde v. *McMann*, 263 F. 2d 940 (2d Cir.
denied, 360 U. S. 937 (1959); *United States* v. *Dennis*,
United States v. *Mitchell*, 138 F. 2d 831 (2d Cir. 1943
denied, 321 U. S. 794 (1944); *United States* v. *Gutt*
147 F. 2d 540 (2d Cir. 1945). The contention of M
much like the claim that was raised in *United St*
Dennis, *supra*. We there said:

> "If the judge feared that the result would
> he said, another of those outbursts which
> found it so hard to deal with, it appears to
> he was within his powers to confine Davis to
> exceptionally capable protection of Mr. Sach
> deprive a judge of that much control over
> issue would play into the hands of any accus
> might seize the opportunity still further to
> a trial already much confounded." 183 F. 2d

The record discloses that Mirra had excellent
sentation by counsel who took advantage of every
tunity by motion, examination and cross-examina
protect his interests.

D. *The Charge*

Appellants contend that the court "failed at any point in his charge on the conspiracy count to instruct the jury that knowledge of illegal importation was a necessary element of the conspiracy", and thereby committed the plain and reversible error we condemned in *United States* v. *Massiah*, 307 F. 2d 62, 70 (2d Cir. 1962). We hold that the charge was sufficient.

At the beginning of the charge on conspiracy, the trial court had the first four paragraphs of the conspiracy count of the indictment read to the jury. These paragraphs, after enumerating the defendants and conspirators, specifically stated the purpose of the criminal enterprise—to unlawfully import narcotics into the United States, and to deal in narcotics knowing them to have been illegally imported. Immediately thereafter, the court, in substance repeated what had just been read by explaining that the defendants were charged with conspiring to violate Sections 173 and 174 of Title 21 U. S. C., and by reading the pertinent portions of the statutes.

There is thus an important difference at the outset between the charge in the present case and that given in *Massiah*. In *Massiah*, the trial court read the appropriate portions of 21 U. S. C. § 173 and § 174 to the jury, but she also read the conspiracy section of the Criminal Code, 18 U. S. C. § 371, and expressly instructed the jury that it was the violation of this provision that was charged in the indictment. The indictment was not read to the jury at all. The many references in the remainder of the court's instructions as to the conspiracy "charged in the indictment" simply compounded the error.

In the present case, the court, at the very outset of the conspiracy charge, read both the indictment and the statutes, 21 U. S. C. §§ 173, 174 under which the defendants were being tried. He did not read the general conspiracy statute, 18 U. S. C. § 371. It must thus have been clear to the jury from the outset that the defendants were charged with conspiring to import narcotics or to deal in them knowing of their illegal importation. Each reference thereafter to the conspiracy "as charged in the indictment" rather than compounding the error re-emphasized the need for such a finding, and directed the attention of the jurors to the appropriate language in the copy of the indictment that they had with them during their deliberations.

After reading the statutes and the indictment, the court continued:

> "There are only three elements of the crime of conspiracy:
>
> (1) The existence of the conspiracy *as charged in the indictment;*
>
> (2) That a defendant knowingly and with wilful intent associated himself with the conspiracy and
>
> (3) The commission by any conspirator of at least one of the overt acts set forth in the indictment." (Emphasis supplied.)

Then, in discussing the first element, he charged:

> "The first element is satisfied if, from proof of all the relevant facts and circumstances, you find beyond a reasonable doubt that the minds of at least two alleged co-conspirators met in an understanding

way so as to bring about an agreement to illegally import and distribute narcotics as charged."

Appellants urge that this language rendered the charge even more erroneous than that in *Massiah* because the jurors were thus "affirmatively told that they could find all the appellants guilty on count eight if but two of the conspirators knew about the illegal importation." On the contrary, this sentence, read in context,[12] permitted the jurors to convict only as to those defendants who knew of the illegal importation, and thus saved the charge from error. Very shortly following this sentence, the court further charged:

> "You may find that the conspiracy existed even if you find that one or more of the persons charged were not members. It is sufficient if any two or more persons have conspired. *You may find those defendants guilty who joined the conspiracy with knowledge of its purpose and acquit those who did not join.*" (Emphasis supplied.)

It was thus made clear that as few as two may be conspirators, but that each must know of the illegal importation. The first passage quoted defined conspiracy, the second, its members.

Later, in dealing with the distinction between single and multiple conspiracies, the court reiterated this analysis:

> "Such a conspiracy [single] may be shown to exist, you will recall, if two or more of the defendant or co-conspirators in some way or manner came to

12 See *United States v. Aquicci*, *supra*, at 825; *Carey v. United States*, 290 F. 2d 422, 426 (D. C. Cir. 1961).

a mutual understanding to accomplish the broad objectives set out in the indictment. Whether or not each defendant joined this conspiracy is another matter which I shall come to in a moment."

Finally, the judge concluded his instructions as to the existence of the conspiracy, and began his charge on its membership as follows:

"If, after considering all the evidence, you decide that the government has failed to prove, beyond a reasonable doubt, the existence of one overall conspiracy *to import and deal in narcotics illegally as charged*, you must acquit all the defendants on count 8.

"On the other hand, if you are satisfied, beyond a reasonable doubt, that the government has proved one overall conspiracy to import and deal in narcotics illegally as charged, *the second element which you must next decide, as to each defendant separately, is whether the government has proved, beyond a reasonable doubt, that he knowingly and intentionally joined or became a member of the conspiracy with knowledge of its unlawful purpose.*

* * *

"The mere fact, however, that a defendant may be present at meetings or associated with members of the conspiracy is not in itself enough to make him a conspirator unless you first find that he intentionally joined a conspiracy *with knowledge of its purpose.*

* * *

"Those who come in later, *with knowledge of the aims and purposes of the conspiracy*, and cooperate in a common effort to attain the unlawful results,

become parties to the conspiracy. All of the conspirators need not be acquainted with each other. They may not have previously associated together. One may become a member of the conspiracy without full knowledge of all of the details of the conspiracy. One defendant may know only one other member of the conspiracy, yet, *if he knowingly cooperates to further the object of the conspiracy*, with knowledge that others have combined to violate the law, he becomes a member although his role may be only a subordinate one." (Emphasis supplied.)[13]

Defense counsel did not except to these portions of the charge. Certainly the lack of further emphasis on this element did not amount to that "plain error" necessary to warrant reversal in the absence of exception taken below. See Fed. R. Crim. P. 30, 52(b). There is no "plain error" unless the "charge may have resulted in a miscarriage of justice or in the denial to appellant[s] of a fair trial." *Herzog* v. *United States*, 235 F. 2d 664 (9th Cir. in banc), cert. denied, 352 U. S. 844 (1956). That is not the case here.[14]

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13 This sentence was held in the context of the *Massiah* charge to have compounded the error therein. In the context of the entire charge in the present case, it was clearly correct. See *United States* v. *Atanasi*, *supra*, at 825; *United States* v. *Aviles*, *supra*, at 188.

14 Several appellants contend that in marshalling the evidence the trial court erred in failing to mention certain details favorable to them. We shall deal with several specific allegations of error at a later point. Reviewing the charge as a whole, we find that the trial judge carefully and specifically summarized the evidence favorable to the defendants, as well as that favorable to the government, in a manner well designed to insure separate consider-

E. *Limitations on Cross-Examination of Smith*

Appellants complain that they were unduly restricted in their cross-examination of the witness Smith. We find no merit in the contention. The trial court permitted extensive and repetitious examination of Smith as to any matters bearing on his credibility, his bias toward the defendants, and his motive for testifying. In addition, the defense had an abundance of material from which to examine Smith, including but not limited to, a statement produced under the Jencks Act, extensive grand jury minutes, Smith's testimony in the first trial, his testimony in an unrelated proceeding in Illinois, and his testimony before

14 (Continued.)

tion by the jury of the evidence for and against each individual defendant. In exercising his broad discretion in marshalling the evidence, the trial judge was not required to comment on every tidbit of evidence in the lengthy trial that each litigant considered most favorable to him. *Allis v. United States*, 155 U.S. 117, 124 (1894). Moreover, the judge carefully instructed the jury that it must consider *all* the evidence, that he could not review the evidence in its entirety, that his reference to certain evidence and not to other evidence did not indicate that he considered that which he mentioned more important, and that in any event, it was the jury's recollection that controlled.

The appellants further content that the trial judge committed reversible error by taking from the jury the factual issue of whether the witness Smith was an accomplice in the conspiracy and in effect instructed them that Smith was an accomplice as a matter of law. Appellants misread the charge. In the passage complained of, the trial court correctly restated Smith's testimony that "by his own admission [he was] an accomplice" to the crime charged. He then cautioned the jury that in light of this admission, it must scrutinize Smith's testimony with special care. This instruction framed in almost identical language, was approved by this court in *United States v. Alucci*, *supra*, at 833.

an Inquiry Officer of the Immigration and Naturalization Service in 1958. Defense counsel were allowed great latitude in utilizing these materials and were permitted to inquire into many matters of a remote nature. See, e.g., *United States* v. *Axiles*, *supra*.

F. *Cadieux Testimony*

Several defendants raise objections to the reading to the jury of the testimony given by Suzanne Cadieux at the first trial. She had there testified that in December of 1958 she had seen the defendant DiPietro make a payment of $47,000 to Pepe Cotroni for the delivery of a package of narcotics and that in February of 1959 she saw Galante meet with the Cotroni brothers, Stoianoff, Robert and an American attorney to arrange for the delivery of $5,500 worth of heroin to that attorney. She also testified as to the incident in which she was threatened by the defendant Mirra after Cotroni's arrest.

On January 9, 1962, Mlle. Cadieux executed an affidavit in Canada, disclosed by the Government early in the retrial, recanting her prior testimony in its entirety and stating that it was all a lie induced by her desire to help Rene Robert then incarcerated in Canada. Her affidavit also contained implications of subornation of her perjury on the part of the Assistant United States Attorney.

At the second trial, the Government moved for permission to read her testimony given at the first trial to the jury on the grounds that she was unavailable as a witness. A *voir dire* on this motion disclosed that the Government's efforts to contact her after her recantation had met with no

success, although defense counsel encountered no such difficulties. The Court properly held that she refused to come to the United States as a witness without any complicity on the Government's part, apparently out of fear that she would subject herself to a perjury charge here if she were to testify at the second trial. The trial judge, however, was also of the view that her prior testimony should not be admitted without some disclosure of the exculpatory matter, and permitted defense counsel to take her deposition in Canada as if it were cross-examination. The Court's finding of her unavailability is buttressed by her refusal to be deposed at the United States Consulate in Montreal, necessitating transfer of proceedings to the Sheraton Mount Royal Hotel. Both her prior testimony and her deposition were read to the jury.

We find no error in this manner of proceeding. Unavailability having been fairly established, her prior testimony was admissible. *Mattox* v. *United States*, 156 U. S. 237 (1895), 5 Wigmore, Evidence § 1404 (3d ed. 1940). See also *West* v. *Louisiana*, 194 U. S. 258 (1904). Allowing the deposition to be taken without subjecting the witness to the perjury sanctions available if she had testified here may have given the defendants even greater latitude than they were entitled to. *United States* v. *Soblen*, 203 F. Supp. 542, 568 (S. D. N. Y. (1961), aff'd 301 F. 2d 236 (2d Cir.), cert. denied, 370 U. S. 944 (1962). There is no merit to the contention that Cadieux's recantation made her prior testimony totally inadmissible. The subsequent extra-judicial statement was merely impeaching material on the credibility of her prior testimony and it was for the jury to decide which, if either, statement was to be believed.

Due to the charges levelled in the Cadieux affidavit at the Assistant United States Attorney, he was permitted to take the stand to testify that at the time Cadieux testified at the first trial, he believed she was telling the truth. The Judge instructed the jury that he was allowing this testimony because if the Assistant believed that Cadieux was lying when he put her on the stand, the jury should acquit the defendants. This testimony was not offered to enhance the credibility of Cadieux' last trial testimony but rather to rebut serious accusations against the Government officer trying the case which, if left unanswered, might have seriously prejudiced the Government. The defense having introduced such material, the Government was clearly entitled to answer it. Cf. *United States v. Graham*, 102 F. 2d 436, 441-443 (2d Cir. 1939). Perhaps the questioning might have been more artfully framed so as to avoid any appearance of the witness's vouching for Cadieux's credibility, but we find no reversible error here. *Lawn v. United States*, 355 U. S. 339, 359 n. 15 (1958).

II

A. *Salvatore Panico*.

Salvatore Panico urges that because the trial judge precluded him from testifying in his own behalf, his conviction be reversed.

After several earlier hints, one of the two attorneys representing the Panico brothers informed the court toward the end of the trial that despite counsel's advice to the contrary, Salvatore desired to testify in his own behalf.

Counsel were in a somewhat embarrassing position in this regard, having represented to the trial court and to this court in an attempt to mandamus a second psychiatric examination of their client, that they could not communicate with him. Since neither attorney desired to call him, the court directed them to confer with him and his brother again and to advise the court of their decision. Subsequent to this conference, during which Salvatore refused to speak with his attorneys, Carmine Panico, his brother, informed the court that Salvatore still desired to take the stand. The court then called Salvatore before him and informed him that he could testify only to facts. He responded that he only wanted to tell "the truth". The court then continued:

> "The Court: But let me tell you now that you cannot take that stand and make any outburst against anybody else.
>
> "Defendant Salvatore Panico: No, I am just going to say the truth, that's all.
>
> "The Court: Are you going to behave as a gentleman on that stand?
>
> "Defendant Salvatore Panico: I am going to say the truth, that's all.
>
> "The Court: Are you going to behave as a gentleman?
>
> "Defendant Salvatore Panico: What do you mean?
>
> "The Court: Behave yourself up here.
>
> "Defendant Salvatore Panico: I am going to say the truth up there. That's what you want. That's what the whole world wants is the truth.
>
> "The Court: You have a right to take the stand."

The court then further advised Panico of his right to remain silent, that he must behave himself on the stand, and that he would be "very severely" punished for contempt if he did not. Finally, the court ordered a fifteen-minute recess and ordered counsel to "prepare him to go on the stand." During the recess, the court overruled an objection by counsel for Ormento to Salvatore's taking the stand, and conferred with his attorneys and with Carmine Panico regarding the questions to be asked. The court warned the marshals to be alert, and ruled that Salvatore would testify from his place in the courtroom, rather than from the witness stand, so that he would be easier to handle in case of a second jury attack or other misconduct.

After dealing with another matter, the court asked counsel whether they could represent to him what Salvatore would testify to. Counsel answered that since he refused to speak to them, they could not say. Thereupon the court ruled:

> "I had him up there before me and he wouldn't answer. When I asked him whether he would behave, he kept shouting he is going to tell the truth.
>
> "I hold, under the circumstances, that he has waived his right to take the stand in his own defense. By his failure to cooperate for psychiatric examination and because of his conduct the risk of prejudicing the other defendants is overwhelming. He has done that time and time again and done so wilfully and deliberately. For those reasons I hold that he voluntarily waived his right to take the witness stand in his own defense."

At common law, the accused was not competent to give sworn testimony in his own behalf in a criminal proceeding.

It was thought that competency would be more harmful than helpful to the accused, since the jury might infer guilt if he then failed to take the stand, while cross-examination might place him in a situation where even an innocent man might appear at a disadvantage if he did testify. And it was believed that due to his overwhelming interest in the outcome, testimony of the accused would not and could not be believed. See 2 Wigmore, Evidence § 579 (3d ed. 1940). The right of the accused to be present and to make his defense was jealously guarded, however:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

Windsor v. *McVeigh*, 93 U. S. (3 Otto) 274, 277 (1876).

Toward the end of the last century, the fallacy of the view denying the competence of the accused to testify came to be generally recognized. A federal statute removing the disability was enacted in 1878, 30 Stat. 20, and is contained today without substantial change in 18 U. S. C. § 3481.[15]

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15 "§ 3481. Competency of accused.

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him. June 25, 1948, c. 645, 62 Stat. 833."

Similar provisions have been enacted in all states except Georgia. See *Ferguson* v. *Georgia*, 365 U. S. 570 (1961).

This statutory "privilege" to testify in one's own behalf has come to be recognized as having an importance similar to the right to be present at one's trial and to present a defense. Thus in *Wilson* v. *United States*, 149 U. S. 60 (1893), the court, after referring to the common law rule, said:

> "This rule, while affording great protection to the accused against unfounded accusation, in many cases deprived him from explaining circumstances tending to create conclusions of his guilt which he would readily have removed if permitted to testify. To relieve him from this embarrassment the law was passed. In mercy to him, he is by the act in question permitted upon his request to testify in his own behalf in the case. In a vast number of instances the innocence of the defendant of the charge with which he was confronted has been established." *id.* at 65-66.

The privilege has been described as one of "inestimable value." *Yates* v. *United States*, 227 F. 2d 844, 846, (9th Cir. 1955). The statute renders the accused competent "provided *only* that he testifies at his own request." *Heitler* v. *United States*, 244 Fed. 140, 141 (7th Cir. 1917) (emphasis supplied). See also *Brown* v. *United States*, 56 F. 2d 997 (9th Cir. 1932); *Wolfson* v. *United States*, 101 Fed. 430 (5th Cir. 1900). It has been held by at least one state court that denial of the privilege deprives the accused of a fair trial. *People* v. *Rukiec*, 260 App. Div. 452, 23 N. Y. S. 2d 606 (1940), aff'd 289 N. Y. 306, 405 N. E. 2d 812 (1942). See also *People* v. *Rosenzweig*, 135 Misc. 324, 239 N. Y. S. 358 (Sp. Sess. 1929).

In view of the importance of the privilege, we cannot say that Salvatore Panico waived his privilege to testify in his own behalf. The question appears to be one of first impression, and while we do not wish to indicate that the privilege may never be waived by conduct, the facts in the present case do not warrant that conclusion. Panico's outbursts and serious misconduct earlier in the trial would have warranted a warning that violence on his part or the hurling of obscenities at the objects of his dislike might result in a curtailment of the privilege of testifying. However, that Panico, when testifying, might have attempted to incriminate all the other defendants and to exonerate himself, was to be expected. He might well have desired to testify for this very purpose but this purpose, even if announced in advance, presents no reason for court or counsel for other defendants to preclude him from so doing. He had a right to say in effect, "I never trafficked in narcotics; such narcotics as I saw were in the possession of defendants A, B and C." Whether the jury would have believed him is immaterial; he should have had the opportunity to present his version of the facts. The trial judge is, of course, under a heavy duty to maintain the order and decorum necessary for a fair trial. By permitting Panico to testify, the court might have risked further outbursts. But upon any sign of misconduct, the marshals could quickly have subdued him, and replaced his gag for the remainder of the trial if necessary. The judgment of conviction of Salvatore Panico must be reversed.

B. *Carmine Panico*

Appellant Carmine Panico urges that the error for which we reverse the conviction of his brother Salvatore requires reversal of Carmine's conviction as well. We do not agree.

The questions raised by Carmine's appeal in no way involve the right of a defendant to testify in his own behalf. Rather, the question relates to the discretion of the trial court to preclude counsel for a criminal defendant from calling a certain witness other than the defendant himself. At the outset, it should be noted that counsel did not attempt to call Salvatore as a witness for Carmine and so he may not complain that the witness was not heard.

Even if Carmine's failure to call Salvatore as his witness may be excused because of the obvious futility of such an attempt, there is no error that warrants reversal of Carmine's conviction. Carmine had already testified in his own defense when Salvatore sought to testify. No tender of proof having been made, we may assume that he, if permitted to testify, would have corroborated his brother's story and his testimony would thus have been cumulative. While such corroborative testimony may be of considerable importance, its admission in evidence rests in the sound discretion of the trial court. Fed. R. Crim. P. 26; 6 Wigmore, Evidence, §§ 1907, 1908 (3d ed. 1940). Under the facts presented, where the corroborating witness sought to be called has made numerous outbursts and engaged in physical misconduct, the trial judge might have concluded, in the exercise of discretion, that Salvatore Panico would

not confine himself to proper testimony in behalf of Carmine, and in view of the risk of prejudice to the other defendants, have precluded Carmine from calling him as a witness.[10]

C. *Galante*

Galante contends that the trial judge abused his discretion in limiting the number of alibi witnesses that he could call in his behalf. Smith had testified to seeing Galante in New York on two separate occasions sometime in June, 1958. The alibi offered was that Galante was in Florida during this period and thus could not have been seen by Smith at the time testified to. Three witnesses testified to this effect on behalf of Galante. The trial judge then ruled that only two more witnesses would be allowed to testify to Galante's presence in Florida on the ground that such testimony was cumulative. The court later revised this ruling to allow Mr. O'Connor, who was then representing Galante, to put on all of his alibi witnesses. Mr. O'Connor could not produce any more witnesses but was allowed to read the prior trial testimony of two of these witnesses to the jury. The judge's offer to permit him to read to the jury the prior testimony of another witness was declined.

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10. Appellant Galante claims error in that if Salvatore Panico had been permitted to testify, Galante could have shown on cross-examination that Panico's outburst placing Galante at the Appalachin meeting was false. This allegation is totally without merit. All that we have said with regard to Carmine's contention applies with equal force here. Moreover, Salvatore's outburst was not testimony, and he could not properly have been cross-examined regarding its truth or falsity.

Galante's claim here is difficult to understand inasmuch as the trial court gave him the opportunity to call as many alibi witnesses as he desired and, when they were not available, allowed their prior testimony to be read to the jury. If the first ruling was error, and we intimate no such view, it was certainly cured by the later ruling.

Galante also contends that wiretaps made in violation of § 605 of the Federal Communications Act furnished the basis for the testimony of witness Carlieux and for the indictment. Judge Levet, on the first trial, held an extensive *voir dire* on wiretap problems and concluded that "there has been no indication whatsoever that information 'obtained from taps has * * * led directly or indirectly to the discovery of any of the evidence' which the government has utilized in the prosecution of the case." Judge Levet was correct. See *United States* v. *Agueci*, *supra*. The wiretaps in question occurred some nine months after Smith began to cooperate with the Government and six months after he had introduced Agent Biase into the conspiracy. The inferences appellant would have this court draw are without foundation in the record.

D. *Mirra*

Appellant Mirra raises several claims of error apart from those already discussed as to all defendants. His first contention is that the indictment should have been dismissed on the grounds of double jeopardy, alleging that he had been convicted of the same offense in *United States* v. *Stromberg*, Cr. 154-86, S. D. N. Y. 1958, aff'd, 268 F. 2d 256 (2d Cir. 1959), cert. denied, 361 U. S. 863 (1959). His

motion to dismiss on these grounds was denied by Judge MacMahon, who adopted the earlier opinion of Judge Levet at the first trial, Opinion #26832 (S. D. N. Y.). We agree with Judge Levet's conclusion that "The Stromberg and Bentvena conspiracies constitute in fact and law distinct and separate ventures." See *United States* v. *Perrone*, 161 F. Supp. 252 (S. D. N. Y. 1958). Comparison of the two cases demonstrates disparate factual contexts. Anthony Mirra was the only defendant common to both prosecutions; the overt acts delineated in *Stromberg* took place between 1951 and 1955 while those in *Bentvena* took place in 1958 and 1959; the source of the narcotics in *Stromberg* was France; in *Bentvena* it was Canada. Neither proof of the facts alleged in the *Bentvena* indictment nor the proof actually submitted would have been sufficient to convict Mirra of participation in the conspiracy charged in *Stromberg*. *See Ferracane* v. *United States*, 29 F. 2d 691 (7th Cir. 1928); *United States* v. *Claus*, 19 F. Supp. 435 (E. D. N. Y. 1937).

Mirra also claims as error the disclosure by the Government to the jury of his prior narcotics conviction in *Stromberg*, *supra*. In the *Bentvena* trial, Mirra took the stand in his own defense and testified that he had been convicted of a crime in 1958. When asked on direct examination if he had ever had anything to do with narcotics, he answered "No". On cross examination the Government was permitted, over defense objection, to ask Mirra what the 1958 conviction was for, and to introduce into evidence the record of his prior conviction. Although such evidence might, in the discretion of the trial judge, have been excluded if offered for general impeachment purposes, the

defendant, having asserted on direct that he never had any connection with narcotics, opened the door to proof impeaching this specific testimony. Cf. *United States* v. *Colletti*, 245 F. 2d 781 (2d Cir.), cert. denied, 355 U. S. 874 (1957); *United States* v. *Nelson*, 273 F. 2d 459 (7th Cir. 1960). The trial judge properly instructed the jury that this evidence could be used only for impeachment purposes and not to prove Mirra's guilt.

In addition, Mirra argues that he was improperly denied certain surveillance reports by officials of the New York State Parole Board and the New York City Police Department covering the period of May and June, 1958, during which Smith and Mirra had allegedly been engaged in various narcotics transactions. The surveillance had been initiated to secure evidence of possible parole violations by the severed defendant David Petillo, and were later turned over to the State Liquor Authority which was investigating Mirra's alleged undisclosed interest in Chickie, James' Stable and LaConiechie. The trial judge orginally denied the reports on the ground that they were privileged, and finally after examining them *in camera*, declined in his discretion to make them available and ordered them sealed.

Passing questions of whether they were privileged information and whether there was sufficient evidentiary basis for their production, see *United States* v. *Iozia*, 13 F. R. D. 335 (S. D. N. Y. 1952), having inspected these reports, we find no prejudice to the defendant by virtue of their non-disclosure. The direct testimony by Smith on this phase of the case is not specific as to dates, but described events only as having occurred early or late in May and

June. The surveillance was directed primarily at the activities of Petillo, and was in no way comprehensive enough in coverage either as to time or area to be of any value to Mirra for impeachment purposes. Furthermore, to the extent that the reports place Mirra, Smith, Fernandez and Petillo at frequent company at Johnny's Keyboard and at Frankie James' Stable, they tend more to corroborate than to impeach the testimony of Smith.

Mirra finally contends that the court improperly denied his motion to suppress evidence allegedly obtained by illegal wiretaps. His claim is that the surveillance already discussed was the result of wiretaps by state authorities during the period from February to October, 1958. Judge Levet found on the first trial, after conducting an extensive *voir dire*, that there was no indication that information obtained from the taps was transmitted to federal agents. The only federal participation alleged by Mirra is the fact that narcotics agent Rowan was shown the contents of the reports which he used when he subsequently questioned Smith in January, 1960. As Smith had already become an undercover employee of the Narcotics Bureau well before his contact with Rowan, these state wiretaps did not bear any relationship to the evidence secured by the federal government against Mirra.

E. *Mancino*

Appellant Mancino also asserts several claims of prejudicial error at the trial. At the time of the negotiations by Smith and Biase to set up a new outlet for narcotics supplied by Cotroni, Cotroni indicated that objections to this

new outlet were being raised by some of his New York people, one of whom he indicated to be Mancino. Cotroni also stated that at one time he had considered Mancino to be a "good man", but that Mancino was on his way down, and the only reason Mancino was good was that he knew all the right people. Mancino contends that these statements were hearsay declarations outside his presence, and were inadmissible because in furtherance of a separate conspiracy in direct conflict with the one charged in the indictment. It is quite true that Cotroni indicated to Smith and Biase that they would be taking $150,000 to $200,000 worth of business from some of these other people, but even if so, a new outlet would be a transfer rather than a conflict with the old conspiracy. A conspiracy, once established, is presumed to continue until the contrary is demonstrated and, as we said earlier, a conspiracy of this kind by its very nature is constantly expanding. There is no indication that Cotroni had any intention of totally severing his supply lines to his other outlets in New York City, including Mancino. While certain of Cotroni's remarks, such as statements to the effect that Mancino used to be a good man, might be considered as inadmissible because purely narrative in character, see *United States* v. *Goodman*, 129 F. 2d 1009 (2d Cir. 1942), others clearly were not, see *United States* v. *Tarricone*, 242 F. 2d 553 (2d Cir. 1957), and any error in admitting the purely narrative declarations was harmless in view of the overwhelming evidence of Mancino's participation. Fed. R. Crim. P. 52(a).

Mancino complains of the refusal by the trial judge to permit the admission of the first trial testimony of Mrs. Susini, the wife of a Parisian attorney. Smith had testified that at the Montreal meeting in April or May of 1957 which Mancino had attended, he met "Pepe" Cotroni as he was leaving the meeting. Cotroni's wife testified that her husband left for Paris in March, 1957, and she did not see him again until May 12, 1957, in Paris. Mrs. Susini had testified at the first trial to seeing Cotroni in Paris on May 5, 1957, and frequently thereafter during the remainer of the month. On a *voir dire*, the defense sought to establish that Mrs. Susini was unavailable on the second trial, thus justifying the use of her prior testimony. Having failed to do so by competent testimony, Mancino's attorney requested permission to take her affidavit in Paris through his Paris office. The Judge denied this request in his discretion on the grounds that it was both collateral and cumulative testimony. We agree that this was merely collateral impeaching material which it was within the Judge's discretion to reject. See McCormick, Evidence § 47 (1954).

In addition, Mancino claims that the Government on summation misquoted the record in belittling an alleged inconsistency, pointing out in defense counsel's closing, between Smith's testimony at the two trials. Mancino argues that the Judge's refusal to correct this misstatement constituted reversible error. Counsel attempts to denominate this inconsistency as "vital", but it is only one of many minor inconsistencies in Smith's testimony brought to the attention of the jury by the defense.

F. *Sciremammano*

Sciremammano contends that the indictment should have been quashed as to him because Smith made no mention in his Grand Jury testimony of Sciremammano by name. However, Smith did testify that he gave narcotics at the Squeez-Inn Bar to someone named Sal who had a club foot. This was sufficient identification of this defendant. As the Supreme Court in *Costello* v. *United States*, 350 U. S. 359, 363 (1956) stated:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. * * * " An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits."

G. *Bentvena, Monastersky and Struzzieri*

The facts developed with respect to the purchase and delivery of heroin which involve Bentvena, Struzzieri and Monastersky constitute the proof which formed the basis of the prosecution's case against them as charged in counts 4 and 5. On January 5, 1959, Agent Giorgio of the Bureau of Narcotics met appellant Monastersky on East 116th Street in Manhattan and on the following day ordered one-half kilogram of heroin from him for $6,000. Monastersky arranged for delivery that evening. During that evening, other agents of the Bureau of Narcotics followed Monastersky and saw him enter 525 East 88th Street.

Several minutes later, a car driven by the defendant Marcantonio Orlandino entered the block. Struzzieri alighted from it and entered the same building carrying a package covered with blue and white Christmas wrapping paper. After some time he emerged empty-handed and drove off with Orlandino. Shortly thereafter Monastersky came out and drove out of the area. Later, the agents observed the co-conspirator, McGovern, come out of the building carrying a package of similar size and wrapping and followed him to 448 East 87th Street.

Later that evening, Agent Giorgio met Monastersky and was told by him that his partner had the "stuff". Monastersky took him to an apartment at 448 East 87th Street and introduced him to McGovern, who threw a package wrapped in blue and white Christmas wrapping paper on the table. Giorgio tested the contents and told Monastersky that it was "junk". The three men left the apartment and went downstairs where Giorgio handed McGovern $6,000 and McGovern gave the agent the narcotics. Another agent saw McGovern and Monastersky return to 525 East 88th Street where they met Struzzieri and Orlandino. Struzzieri and Orlandino left and were later overheard discussing Agent Giorgio's unwillingness to part with the money in advance of receiving the narcotics.

On January 13, 1959, Giorgio ordered more narcotics, agreeing to meet Monastersky that evening. They met and proceeded to 525 East 88th Street where they were told to return in an hour. Monastersky explained to the agent that the "junk" wasn't there yet. Approximately 50 minutes later, Bentvena and Struzzieri entered the building. Gior-

gio returned, accompanied by Agent Mangiaracina, who was introduced to Monastersky by Giorgio as his partner. While Mangiaracina waited in the lobby at 525 East 88th Street, Monastersky and Giorgio went to a second-floor apartment, passing Struzzieri and Bentvena on the way in. Giorgio, on being told by McGovern that these two were the delivery boys, asked McGovern to tell them not to become apprehensive of Mangiaracina, who was in the lobby, as he was Giorgio's partner. McGovern went to the house-phone, spoke into it, and returned saying the junk would be there in a few minutes. Struzzieri and Bentvena walked to a car parked on 88th Street, opened the trunk, and removed a package which Bentvena tucked under his arm. Both men returned to McGovern's apartment, walking past Mangiaracina who was still in the lobby, and delivered the package to McGovern. The sale to Giorgio was then consummated.

In subsequent conversations between McGovern and Giorgio, McGovern discussed his overhead—$200 to Monastersky and $50 to the delivery boys. When, after numerous conversations between Giorgio, Monastersky and McGovern, agreement on the terms of future transactions could not be reached, negotiations were discontinued.

The evidence allegedly connecting Monastersky, Bentvena, and Struzzieri to the conspiracy consisted of (1) a glassine bag filled with narcotics seized from Marcantonio Oriandino evidencing a puncture sealed with an "X" in Scotch tape, (2) Oriandino's phone book containing a phone number alleged to be Tuminaro's, and (3) the hearsay remarks of Cotroni to Smith to the effect that the narcotics seized from Oriandino had belonged to "Bootsie" and

"Angie" (Tumiñaro and DePasqua) and had been supplied by Cotroni and that the "X" Scotch tape covering of the puncture was his trademark.

Although it is clear that the hearsay declarations of a conspirator are admissible against his co-conspirators if made pursuant to and in furtherance of the conspiracy, *Clune* v. *United States*, 159 U. S. 590, 593 (1895); *Fiswick* v. *United States*, 344 U. S. 604, 617-18 (1953), it is equally clear that there must be independent evidence establishing a defendant's participation in the conspiracy before such declarations are admissible against him. *Glasser* v. *United States*, 315 U. S. 60, 74-75 (1942); *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 576 (2d Cir. 1961); *United States* v. *Stromberg*, 268 F. 2d 256, 265-67 (2d Cir. 1959). A defendant's "participation in the conspiracy which the Government sought to prove can be established only by proof, properly admitted into evidence, of their own words and deeds." *United States* v. *Russano*, 257 F. 2d 712, 713 (2d Cir. 1959). Such independent proof must be substantial and not "too slight." *United States* v. *Consolidated Laundries Corp.*, *supra*; *United States* v. *Stromberg*, *supra*.

The Government's independent proof of participation fails to meet this standard and is tenuous at best. For the first time on appeal, the Government places primary reliance on the so-called Cotroni trademark found on the narcotics seized from Orlandino. Assuming *arguendo* that a Cotroni trademark was sufficiently established, nevertheless, that finding would have to be bottomed solely on the hearsay remarks of Cotroni. No independent evidence ad-

missible against these defendants establishes the existence of such a trademark. In fact, the sole independent evidence available to connect these defendants with the conspiracy is the presence of the phone number alleged to be Tuminaro's, in Orlandino's phone book. To find this to be of significance would be tantamount to holding that the mere association of conspirators is sufficient basis for a finding of participation. This notion we have already explicitly rejected. *United States* v. *Stromberg*, *supra*, at 267. The Cotroni hearsay thus being inadmissible against them, the Government failed to prove these defendants' participation in the overall conspiracy, and their conspiracy convictions must be reversed. My colleagues, however, believe that the joinder of the substantive and conspiracy counts against Bentvena, Monastersky and Struzzieri with the conspiracy count against the other defendants was so prejudicial as to also require reversal of their convictions on substantive counts 4 and 5. Therefore, the balance of this opinion expresses my dissent from the views set forth in the opinion of Judge Smith.

Struzzieri, Monastersky, and Bentvena contend, and the majority agree, that reversal of their substantive convictions is required, first, because they were improperly joined in this indictment, second, because they were tried in this mass conspiracy trial and, third, because evidence, particularly hearsay evidence, was admitted under the conspiracy count and the court failed to adequately instruct the jury that such evidence could not be used to convict under the substantive counts. In my opinion, the decision of the majority adopting these arguments represents a radical departure from the practice heretofore

sanctioned in this circuit and elsewhere and may, in my view, effectively bar any joinder of substantive and conspiracy counts in criminal prosecutions.

Turning to the first contention of appellants—improper joinder, it is settled that failure of the prosecution to present sufficient independent evidence of the participation of these three defendants in the conspiracy charged does not require the conclusion that the indictment was improperly obtained *ab initio* or that the conspiracy and substantive counts were improperly joined. *United States v. Schaffer*, 362 U. S. 511 (1959). An indictment merely contains the charges which the prosecution hopes to prove—a platitude dinned into the ears and minds of the jurors throughout the trial. To anyone familiar with the courtroom scene, the cases are legion in which defendants are convicted on some counts, acquitted on others, cleared of conspiracy, convicted on substantive counts, and vice versa. Witnesses to support the indictment may or may not be available or they may change their stories upon the trial. Alibi witnesses may suddenly appear to refute the Government's witnesses. In other words, the mere fact that the Government fails as to one or more counts does not mean that the indictment was improperly obtained or secured in bad faith. These should be elementary truisms.

The next asserted ground for reversal—that these three appellants were prejudiced by being tried in this mass conspiracy trial, is articulated by the majority as concern over the fact that they were "forced to sit through months of testimony establishing the conspiracy, none of which related to the substantive accusations." Much of what has

just been said as to joinder is applicable here. Since these appellants were properly joined in this indictment, it is difficult to understand why they should not have been tried under it. Determination of whether there was sufficient proof to implicate them in the conspiracy had to await the end of the case. If, at that point, the trial judge, the jury or (later) an appellate court finds that the prosecution has not proved its case on the conspiracy count, the defendants are not, solely because they have been forced to sit through a long trial, entitled to the bonus of acquittal or reversal on the substantive counts which the government has proved.

The critical inquiry here is whether severance was required because of possible prejudice arising from the joinder of these three appellants with the other defendants. *United States* v. *Schaffer*, *supra*. A realistic approach to this question requires consideration of the nature of the narcotics conspiracy itself and a review of some recent decisions of this Court.

Investigation of a narcotics ring usually has its origin in a sale or series of sales made to narcotics or undercover agents. The salesmen, however, are as a rule on the outer fringe—the lowest echelon in the hierarchy of narcotics rings. Note, in passing, the "delivery boy" status ascribed to Bentvena and Struzzieri who for $25 apiece were in actual possession of a commodity retailing at $6,000 a half kilo. Quite frequently, the ringleaders or overlords of the narcotics business do not stultify themselves by possession when handlers can be so cheaply hired. Therefore, in an effort to bring a modicum of reality into the picture,

the courts in the absence of Congressional action have had to create the doctrine of constructive possession or control. But the Government has learned that the occasional arrest of mere sellers will not seriously impede the drug flow. It is necessary, if possible, to apprehend those who are in charge of importation, wholesaling and retailing. Thus, when one of these major narcotics conspiracies is brought to trial, the number of defendants is usually large and the facts complex.

The character of some of the multi-defendant narcotic trials of importance brought in the federal courts in New York within the last five years illustrates the above quite vividly. In *United States* v. *Strombota, supra*, there were 46 defendants and 16 others charged in a single conspiracy count. Of this number, 19 were tried together. The trial court directed a verdict of acquittal as to one, the jury convicted 18. On appeal, this court examined the record to determine whether there was sufficient independent evidence to sustain the conviction of each defendant. As to three defendants, this court found the evidence too slight to have been submitted to the jury, and reversed and remanded with directions to dismiss. The "mass trial" arguments were rejected, the court finding that "nothing in the issues, the evidence or the rulings warrants a conclusion that the number of defendants prevented the jury from appraising the independent evidence against each defendant and meting out individual justice under the law." 268 F. 2d at 624.

In *United States* v. *Avila, supra*, 37 defendants and 14 co-conspirators were named in the indictment. 17 stood

trial, one was acquitted by the court, one by the jury, and the balance were convicted. Again, this court reviewed the record to determine whether there was sufficient evidence of knowing participation of each defendant in the conspiracy to warrant submission of the case as to him to the jury. As to one defendant, the court held that there was no such evidence and directed dismissal of the indictment as to him. The mass trial argument advanced was rejected and the convictions of 16 defendants were affirmed.

In *United States* v. *Agueci*, *supra*, the indictment contained 30 counts, the first count charged conspiracy, the remaining twenty-nine counts charged various defendants with substantive violations. There were 19 named defendants and 8 co-conspirators. 11 were convicted, 10 appealed. Several appellants contended that although the indictment charged one continuing conspiracy, the proof actually revealed several separate and independent conspiracies and that the prejudicial effect thereof required reversal. However, this court held that, even had there been several conspiracies, they could have been consolidated for trial. Furthermore, we said that "the conduct of the trial was such that the danger resulting from the admission of evidence not chargeable to any appellant was minimal." 310 F. 2d at 827.

In each of those cases, some defendants had to sit through a lengthy trial after all the evidence relating to them had been introduced or had to patiently await the evidence that implicated them. This is inherent in the very nature of the case being tried. The courts have long recognized that narcotics conspiracies require a functional

division of labor. A pusher may be the subject of the testimony of a single witness who might be called on the first or last day of trial. So, too, the "executive" has to sit through testimony relating only to minor sales about which he may know nothing. This has never been considered by this court to be so prejudicial as to require severance or reversal by an appellate court when severance was refused. This prejudice, if it be such, would also exist if the jury found the defendants not guilty on the conspiracy count but guilty on substantive counts.

Struzzieri, Monastersky and Bentvena contend, and the majority agree, that evidence, particularly hearsay evidence, was admitted under the conspiracy count and that the court failed to adequately instruct the jury that such evidence could not be used to convict under the substantive counts. Appellants point to Cotroni's statement that the Orlandino "junk" was his; to McGovern's statement that Struzzieri and Bentvena were his delivery boys; and to an entry in a telephone book belonging to Orlandino containing the name "Ang. Tumanaro", an address and a phone number. The validity of these contentions can be resolved only from the charge itself.

The court dealt with each count separately and instructed the jury that each count of the indictment must be considered separately and that the guilt or innocence of each defendant referred to in that count must be determined separately. After Count 4 (Struzzieri and Monastersky) was read in its entirety, the court summarized the evidence to be considered by the jury in deciding whether the defendants charged therein were guilty or innocent. The summary of proof necessary for "The government, to

establish the first essential element against Struzzieri and Monastersky" encompassed primarily the testimony of two narcotics agents concerning the events of January 5 and 6, 1959, including the meeting with Monastersky and McGovern, the order from the Agent to Monastersky for one-half kilo for $6,000, Struzzieri's carrying the package and payment and delivery. The defense testimony was also summarized. Struzzieri, testifying in his own defense, claimed the package contained a shirt, not heroin. Monastersky also testified that the discussions with the agents related to the organization of a crap and blackjack game and that the cash was the amount the agent had available to invest in the game. No reference was made to any of the facts (later summarized by the court in dealing with count 8 and developed largely through the witness Smith who did not testify as to any of the facts involved in the substantive counts) upon which the conspiracy was based or to the "delivery boy" hearsay by McGovern or to the Cotroni, Orlandino hearsay. In short, the evidence controlling guilt or innocence under this substantive count was limited to the events actually observed or clearly admissible conversations.

The court's summary as to Count 5 was also limited to the events of January 13, 1959, and covered the testimony of three agents who described the order to Monastersky for another half kilo at $6,000, the activities of Bentvena, Struzzieri and McGovern, and the delivery of, and payment for, the heroin. Struzzieri, testifying in his own defense, claimed that the package which Bentvena took out of a car contained betting slips, not heroin. No conspiracy proof was mentioned as applying to this count.

Although there was no direct evidence that Monastersky had actual physical possession of the packages involved in the transactions of January 6 and 13, there is ample evidence upon which a conclusion of constructive possession or control can be based. Similarly as to Struzzieri, he may not have physically handled the package on January 13, 1959, but the proof was sufficient to warrant a finding of constructive possession or control.

The court's instructions to the jury properly defined the elements entering into constructive possession and control, and related them to the actual proof presented. The court adverted to no testimony as to events subsequent to the middle of January, 1959, or which were developed as part of the proof introduced to establish the conspiracy.

In contrast to the evidence summarized as to the specific sales of January 6th and 13th, 1959 (the substantive counts), the court's treatment of the conspiracy count was entirely different. After count 8 had been read, the court separately reviewed the conspiracy testimony, commencing with the Montreal meeting in April or May, 1957, attended by many of the defendants and including the various importations from Canada to New York and the distribution of the heroin to the several outlets in New York and Brooklyn. Only to connect Monastersky, Struzzieri and Bentvena to the conspiracy were the hearsay "delivery boys" and "Cotroni" conversations referred to. Thus, the court was diligent in keeping the many items of proof confined to the counts to which they related.

The fear expressed by these three appellants that the jury, in convicting them on the substantive counts, may have been influenced by proof tendered to establish the

conspiracy count is belied by the jury deliberation itself. Soon after the jury began its deliberations, they requested that the testimony regarding the Bentvena-Struzzieri-Monastersky sales of narcotics be read, along with the instructions on these substantive counts. Also requested were all the exhibits on the first substantive count, count 4, and an index of all exhibits received in evidence. The jury was brought in and asked to be more specific on the first three of these requests. A few minutes later the jury returned a note specifying those parts of Agent Giorgio's testimony regarding the January 6, 1959, transaction that were desired. Shortly after this testimony was read, the exhibits on count 5 were requested. Further requests by the jury related only to the conspiracy count. It seems clear that the jury, during its five days of deliberation, considered each count separately and, in considering the substantive counts, used only the evidence that had been marshalled by the judge in his charge on the substantive counts. As noted above, none of the hearsay declarations were included in this summary.

Despite the instructions given, the careful marshaling of the evidence, and the jury deliberations, the majority "cannot feel confident" that the hearsay declarations did not contribute to the convictions on the substantive counts. Again, I must voice my view that this is simply unrealistic. The error which causes reversal of the conspiracy convictions of these three appellants was the failure to connect them to the conspiracy except through evidence we now hold to have been inadmissible. But this evidence did not relate to the substantive counts in any manner whatsoever. This my colleagues virtually concede in saying, "The week

of proof at the beginning of the trial relating to these three was practically the only reference to them. Thereafter, the trial was solely concerned with proof of guilt in the conspiracy." From this they conclude that "no prejudice to the other defendants resulted from their trial with the three substantive-count defendants", the reason given being that "It is unlikely that this would confuse jury deliberations." However, if the jury were not confused by the separate conspiracy phase, why would it have been prejudicially confused by the equally separate substantive phase.

If the possibility of confusion is to be our concern, it would be well to consider the confusion that will now surround prosecutors and trial judges as a result of the majority decision. Consider some of the possibilities inherent in the usual multi-defendant narcotics trial. Somewhere amongst the defendants will be one or more who, the prosecutor charges, have actually made sales of narcotics and who are also part of the conspiracy. If the jury acquits them on the conspiracy count but convicts on the substantive count, how can any appellate court "feel confident" that hearsay evidence received solely on the conspiracy count might not have been a prejudicial factor in the conviction on the substantive count. The same situation is presented if tainted evidence is received on the substantive counts and the jury brings in a verdict of guilt only on the conspiracy count. The same will be true if only substantive counts are charged and evidence is erroneously admitted as to one count on which the jury finds the defendant not guilty. There can be no logical distinction drawn between these situations and the situation before us where an appellate court, instead of a trial judge or a jury, finds that conviction on one count, as to which tainted

evidence was received, was not warranted. Upon appellate review how can we ever "feel confident" that a jury in convicting did not rely upon some answer given before objection taken and subsequently stricken or upon something said by court or counsel despite instructions to ignore such remarks. Any argument to the effect that such a possibility is less likely when the jury brings in a verdict of not guilty on the unproven count because the jury probably discredited such evidence or because such evidence was not related to the other counts is pure speculation. The jury may have fully credited such evidence but found that guilt was not proved beyond a reasonable doubt.

If a feeling of confidence is to be our standard, we should forbid the joinder of counts in one indictment. Appellate courts have never found this course necessary, however, because they have followed the rule that testimony related to counts on which there was an acquittal is not harmful even if it was improperly admitted at trial. Thus, courts have consistently held that if there was sufficient evidence to support conviction on one count, errors relating to other counts will not be reviewed if the sentences are to run concurrently. *See e.g., Lawn* v. *United States*, 355 U. S. 339, 362 (1958); *Sinclair* v. *United States*, 279 U. S. 263, 299 (1929); *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Pinkerton* v. *United States*, 328 U. S. 640 (1946); *United States* v. *Mont*, 306 F. 2d 412 (2d Cir. 1962); *Blassingame* v. *United States*, 254 F. 2d 309 (9th Cir. 1958); *Thomas* v. *United States*, 211 F. 2d 45 (D. C. Cir.), cert. denied, 347 U. S. 969 (1954); *Miranda* v. *United States*, 196 F. 2d 408 (9th Cir.) cert. denied, 344 U. S. 842 (1952); *Gibson* v. *United States*, 149 F. 2d 381 (D. C. Cir., cert.

denied, 326 U. S. 724 (1945). And this has been the practice even when an appellant contended that there was insufficient evidence to convict him on a conspiracy count if the court found that his substantive conviction was warranted by the record. *See United States* v. *Agueci*, *supra*; *United States* v. *Cipolillo*, 2d Cir. April 24, 1963.

I feel that in cases where the conspiracy count is dismissed at the close of the prosecution's case by the trial judge, or where the jury returns a verdict of not guilty on the conspiracy count, or where an appellate court reverses a conviction on the conspiracy count, we should follow the standards applied by Judge Medina in *United States* v. *Schaffer*, 266 F. 2d 435 (2d Cir.), aff'd, 362 U. S. 511 (1959). There it was found that no prejudice existed, first, because instructions were given on every offer of proof that evidence admitted with respect to one defendant was not to be considered with respect to any other defendant. Second, the witnesses were called in orderly fashion so that each group of witnesses focused on a separate defendant. Third, the court's charge carefully reviewed the evidence pro and con with respect to each defendant, and an admonition was given to keep the charges separate and to consider the evidence against each defendant separately. Each of these safeguards against adverse prejudice is satisfied here. In addition, the court charged the jury in the exact language approved by the Supreme Court in *Blumenthal* v. *United States*, 332 U. S. 539, 559-60 (1947), namely, that "the guilt or innocence of each defendant must be determined by the jury separately. Each defendant has the same right to that kind of consideration on your part as if he were being tried alone." Thus,

in view of the more than adequate evidence of guilt on the substantive counts, I would affirm those convictions.

The other appellants also seek to take advantage of this joinder, claiming prejudice by being tried with the Orlandino phase defendants. This effort must fail, however, because all of the evidence introduced at trial was properly admissible against these appellants. There was sufficient independent evidence to link these appellants to Cotroni as members of the same conspiracy. The Cotroni statements to Smith and Biase concerning Orlandino were thus binding on these appellants and were sufficient to make the Orlandino phase defendants their co-conspirators in one overall conspiracy. The fact that there was sufficient independent evidence to make the Cotroni statements binding on the Orlandino phase defendants does not change this result. The situation presented is that the Government proved the existence of one overall conspiracy but failed to present sufficient independent evidence to make the Cotroni statements admissible against Bentvena, Monastersky and Struzzieri. Since they were their co-conspirators, the other appellants cannot claim error in the introduction of evidence relating to the Orlandino phase defendants, or prejudice in being tried with them.

We wish to express our special thanks and gratitude to Constantine N. Katsoris, Esq., and William R. Luney, Esq., who acted as assigned counsel, both at trial and on appeal, and to Richard V. Giordano, Esq., who acted as assigned counsel on appeal. The trial of this case was long and arduous and preparation of the appeal required the reading of the 25,000-page record of both trials. The devotion and skill demonstrated by these attorneys casts credit

upon them. Their briefs and oral arguments conformed to the highest standards of the profession.

The convictions of Bentvena, Monastersky and Struzzieri on the substantive and conspiracy counts are reversed, and the substantive counts are remanded for a new trial; the conviction of Salvatore Panico on the conspiracy count is reversed and remanded for a new trial; the convictions of all other appellants are affirmed.

SMITH, *Circuit Judge*, with whom HAYS, *Circuit Judge*, joins, concurring in part:

Judge Hays and I agree with the careful and exhaustive opinion of our brother Moore except in one respect, the affirmance of the convictions on the substantive counts, 4 and 5.

The trial of Bentvena, Struzzieri and Monastersky together with those indicted and tried only for conspiracy under the circumstances here portrayed, we feel, constituted prejudicial error as to them. The proof of their participation in the transactions alleged in the substantive counts was presented at the start of the government's case. Thereafter, they and the jury were forced to sit through months of testimony establishing the conspiracy, none of which related to the substantive accusations. We cannot feel confident that the admission of this evidence against them, when it was legally inadmissible unless they were shown to be part of the conspiracy, did not contribute to their convictions on the substantive counts by blackening them with

the general guilt. See *Schaffer* v. *United States*, 362 U. S. 511, 523 (1960) (dissenting opinion).

This is not a case like *Schaffer* v. *United States*, *supra*, or *United States* v. *Manfredi*, 275 F. 2d 388 (2 Cir. 1960), in which the dismissal of a conspiracy count as to less than all defendants during trial was held not to prevent submission to the jury of substantive counts against these defendants. (It may be noted that even in *Schaffer* four judges dissented.) Proper cautionary instructions there can presumably limit the prejudicial effect of the evidence presented at the trial directed towards proof of the conspiracy. Indeed, one might speculate that a jury would scrutinize evidence of substantive guilt with greater than ordinary care once apprised of the fact that the government had failed to prove its conspiracy case against a particular defendant. But in the case at bar there were no limiting instructions to disregard evidence concerning these defendants. All counts were submitted to the jury, which found defendants guilty of conspiracy on evidence that we have unanimously held to be legally insufficient, and then considered the mass of hearsay declarations of purported co-conspirators against them. There appears to us far greater likelihood of prejudice here than in a case where the jury has weighed the evidence of conspiracy and found it wanting, or where the Court has so found and warned the jury to disregard it.

Particular evidence of prejudice can readily be found. Stazzone and Monastersky both took the stand and denied dealing in narcotics. Though admitting their physical presence in the area and certain details as to their physical movements, they claimed that their activities and those of

Bentvena related to gambling transactions. Struzzieri's testimony to fourteen or fifteen bookmaking arrests (supported by police testimony) lends a certain wry corroboration to his story. Both Bentvena and Struzzieri were brothers-in-law of the severed defendant McGovern, who figured prominently in the alleged substantive violations. The package wrapped in Christmas paper was said to be a present to him. From these and other details, the three sought to explain the activities in which they were observed on some basis other than dealing in narcotics. We may be skeptical, but it is not our primary function to appraise this evidence. The jury charged with that duty could hardly have given their defense the same consideration after they were erroneously found to be narcotics conspirators as it would have had they been tried on the substantive counts alone. The mass of conspiracy evidence militated against their credibility and towards their guilt.

Nor do we overlook the general prejudice that results to unrelated defendants who are tried in a mass conspiracy trial. We need but quote *Kotteakos v. United States*, 328 U. S. 750, 772-73 (1946):

> "Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition, and call for the use

of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few; though many others may be doing the same and though some of them may line up with more than one group.

"Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift towards totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

However, we find that no prejudice to the other defendants resulted from their trial with the three substantive count defendants. The week of proof at the beginning of the trial relating to these three was practically the only reference to them. Thereafter, the trial was solely concerned with proof of guilt in the conspiracy. It is unlikely that this would confuse jury deliberations. Moreover, all of the direct evidence of their participation in the conspiracy was properly admitted against the conspiracy defendants. These appellants attack so-called "real evidence", (narcotics and paraphernalia) which was admitted—particularly that allegedly purchased from the three which they claim to be inadmissible against the conspiracy defendants on the record before us. Once they were linked to the conspiracy by independent evidence this

appears properly admissible against them. Moreover, this was of itself of no particular force to prove participation in the conspiracy by any individual. It was merely duplicative of other like evidence seized from co-conspirators which was properly admitted. Even if there were error in the admission of any of this evidence we could not hold it prejudicial.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of June one thousand nine hundred and sixty-three.

Present:

HON. LEONARD P. MOORE
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM BENTVENA, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, ad-

said District Court of appellants Bentvena, Monastero and Struzzieri as to the substantive and conspiracy counts be and they hereby are reversed, and that the action as to said appellants be and it hereby is remanded for a new trial as to the substantive counts in accordance with the opinion of this court.

It is further ordered, adjudged and decreed that the judgment of conviction of appellant Salvatore Panico on the conspiracy count be and it hereby is reversed and that the action be and it hereby is remanded for a new trial in accordance with the opinion of this court.

It is further ordered, adjudged and decreed that the judgments of conviction of all other appellants be and they hereby are affirmed.

A. Daniel Fusaro

Clerk

By Vincent A. Carlin

Chief Deputy Clerk

APPENDIX C

CONSTITUTION OF THE UNITED STATES

Amendment V

"No person shall be [redacted] nor be deprived of life, liberty, or property, without due process of law; . . ."

FEDERAL RULES OF CRIMINAL PROCEDURE

"*Rule 14.* Relief from Prejudicial Joinder.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendant or provide whatever other relief justice requires."

Office-Supreme Court, U.S.
FILED
OCT 30 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 346

CARLEE Di PIETRO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY TO RESPONDENT'S BRIEF OPPOSING CERTIORARI

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IN THE

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REPLY TO RESPONDENT'S BRIEF OPPOSING CERTIORARI

The petitioner respectfully invites the Court's attention to the following:

1. The Government brief erroneously asserts that "All petitioners *except Di Pietro* (No. 346) and Galante (No. 468) state that they adopt, insofar as applicable, the questions presented in companion petitions for certiorari" (p. 3). (Italics supplied) On page 30 of Di Pietro's petition there appears the following statement:

> "The petitioner Di Pietro respectfully adopts each and every ground for granting certiorari submitted by his co-defendants, insofar as they may be applicable to his case."

2. The Government's brief also erroneously states that the petitioner Di Pietro "was found guilty of contemptuous conduct during the course of the [first] trial," and cites *United States v. Galante*, 298 F. 2d 72, cert. den. *sub nom.*

Mirra v. *United States*, 371 U.S. 927, in support of this assertion. In point of fact, Di Pietro was *not* held for contempt during or after the first trial; he never so much as opened his mouth during the entire course of that abortive proceeding. Furthermore, the Government's citation of purportedly supporting authority for its erroneous statement is oddly distorted. The case cited, at 298 F. 2d 72, involved the contempt of Galante and Mirra, at the first trial, *not* of Di Pietro. The denial of certiorari cited (371 U.S. 927) does indeed involve a contempt citation against Di Pietro, but it relates to the *second* trial, the one as to which review is here sought.

3. The Government's brief is also unfair and misleading in that it describes Di Pietro's denunciation of Panico in a context of acts of other defendants which were not, like Di Pietro's, provoked by Panico's improper behavior (p. 26). The Government seeks to make Di Pietro's act seem highly improper and contemptuous. In point of fact, the petitioner verbally assailed Panico only after Panico had described him, in the jury's hearing, as a "dope pusher" (Tr. 5, 889). Most significantly, the trial judge himself acknowledged that this incident had been the product of "extreme provocation" against Di Pietro (Tr. 9,060).

4. The Government's assertion that the trial judge did not abuse his discretion in failing to sever the trial of Panico (pp. 27-28) is also clearly erroneous. It is expressly founded on the premise that the "trial judge reasonably concluded Panico's behavior was not the uncontrollable product of mental illness" (p. 28), which flies squarely in the face of this Court's recent holding to the contrary in *United States* v. *Panico*, No. 45, in the October Term, 1963.

If Panico's trial should have been severed—as seems demonstrably clear from this Court's ruling on Panico's petition for certiorari—then it follows that Di Pietro's motion for a mistrial, founded on the failure to sever Panico's trial should have been granted, and the failure to accord that relief constituted reversible error. (See Di Pietro's Petition For a Writ of Certiorari, pp. 24-26.)

5. The Government's own brief underscores the injustice of the rule of *United States* v. *Avila*, 274 F. 2d 179, cert. den., 362 U.S. 974, by admitting that three of the defendants—including Di Pietro*—were not shown to have been responsible for the trial disorder, but nevertheless maintaining that even these defendants should not have been granted a mistrial. As petitioner has already argued at length, this conclusion "violates the right of each of the defendants in a conspiracy trial to have his guilt determined individually. (See *e.g.*, *Kotteakos* v. *United States*, 328 U.S. 750, 773-776)." (See Petition, pp. 14-21).

Respectfully submitted,

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Of Counsel.

October 28, 1963.

* At page 27 of its brief, the Government admits that "Mancino, Hernandez and concevably Di Pietro" were not parties to the trial disorder. The slight reservation in regard to Di Pietro was probably based on the Government's erroneous belief that Di Pietro had been convicted of contempt as a result of his behavior at the first trial (see, *supra*, subd. 2).

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FILED
NOV 6 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 346

CARMINE PANICO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF—IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1963

No. 346

CARMINE PANICO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF—IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

1. Preliminarily, we respectfully observe that this Court's decision of October 21, 1963 in No. 45, *Salvatore Panico v. United States*, granting the writ of certiorari, vacating the judgment of the Court of Appeals, and remanding the case to the District Court, has or ought to have a significant impact upon the within certiorari petition of Carmine Panico, the brother of the petitioner Salvatore Panico in No. 45. We would respectfully recall to the Court that in our "Conclusion" to Carmine Panico's petition for certiorari herein (pp. 38-39) we said:

> * * * "It is also submitted that, in the event that the Court is not prepared to grant this petition on the sole and distinct basis of the matters presented herein, the disposition of the petition should be deferred pending the Court's ruling upon the petition of Salvatore Panico pending in No. 633 [i.e., now No. 45]; for, if the latter petition is granted, an

ultimately just and final determination as to the legality of the conviction of Carmine Panico may have to be postponed until after Salvatore Panico shall have had a new hearing as to his mental competency."

The above was written prior to the Court's decision in No. 45. That decision, it is assumed, will result in a new hearing as to the mental competency of Salvatore Panico—unless the Government should elect not to retry the contempt charges against Salvatore, in which event the inference thereby raised that the Government is not prepared to continue challenging Salvatore's claims of mental incompetency would, of course and in itself, operate strongly in favor of the granting of Carmine Panico's within petition for certiorari. The indissoluble connection between the merit or non-merit of Carmine Panico's certiorari issues and Salvatore Panico's mental condition was pointed out in Carmine's petition for certiorari (pp. 2-3, 15-23, 24-25, 28-39). Much if not most of the argument and reasoning in the Government's Brief In Opposition—we refer to the Government's (and both lower Courts') unquestioning assumption that Salvatore Panico's extraordinary conduct during the trial was feigned instead of being the conduct of a mentally disturbed person—has now entirely lost any claim to consideration by this Court in view of the aforementioned decision in No. 45. That is, the Government's (and the lower Courts') position that Carmine Panico's contentions of fatal prejudice stemming from his brother's behavior and the Trial Court's actions in regard thereto lack merit because Salvatore was faking, has now in effect been declared by this Court itself to be an untenable position on the present state of the overall record in No. 45 and in the instant case.

2. We note that the Government has made no presentation to this Court concerning Carmine Panico's Questions Presented Nos. 3, 4 and 9.

3. The Government's statement (Br. in Opp. 5) that the distressing events at the second trial "had their genesis in the first trial" is very unfair in its application to Carmine Panico. The single specification adduced by the Government in support of this statement as regards Carmine Panico, namely, that the latter was "found guilty of contemptuous conduct" at the first trial, is false and indeed has now been repudiated by the Government itself *per* the recent letter of the Solicitor General acknowledging that this is a mistake. Not only were neither of the Panico brothers charged with or found guilty of contempt in connection with the first trial, but the record of that trial may be read in vain for any indication of trouble of any sort from the Panicos. Nor did the Panicos experience any difficulty with representation by counsel at the first trial. The Panicos had no trouble of any sort during that trial, which was conducted by Judge Level, and they caused no trouble. The trouble did not begin until Judge MacMahon came into the picture to handle the pretrial arrangements for the second trial which he was assigned to conduct. It is most unfair, we repeat, for the Government to try to tinge petitioner Carmine Panico with any of the alleged bad coloration of other defendants' conduct during the first trial.

4. Likewise unfair is the Government's treatment of the pretrial happenings after Judge MacMahon's entry (there is no allegation of trouble occasioned by the Panicos during that pretrial phase prior to Judge MacMahon's entry) (Br. in Opp. 6-8). The Government's description (*id.*, 7) of the Panicos' problem of representation by counsel dur-

ing the pretrial is a marvelous over-simplification (see Carmine Panico's petition for certiorari herein at p. 16, where we refer the Court to the full description of these happenings as given on pp. 6-15 of the Panicos' printed brief in the appeal below, copies of which were filed in this Court in No. 45). Less telescoped but not less simplistically unfair is the Government's argumentation on this same pretrial aspect at Br. in Opp. 32-33 (see the references to our petition for certiorari and the Panicos' printed brief in the appeal below cited in the parentheses at the end of our last preceding sentence herein).

5. The Government's description of the disorderly happenings at the second trial and of Judge MacMahon's measures in regard thereto (Br. in Opp. 13-19, 25-32) also does severe injustice to petitioner Carmine Panico, all the more so in view of this Court's recent decision in No. 45 vacating the lower Courts' respective adjudications that Salvatore Panico was faking insanity. It is wrong for the Government to say (Br. in Opp. 17) that on the occasion of Salvatore's most serious misbehavior (his violent foray into the Jury box) "he was seconded by his brother Carmine". This is wrong because what was really happening on that occasion in regard to Carmine was that he was reacting with uncontrollable fraternal distress in the face of the mental agonies of his brother Salvatore (see Pet. Cert. herein p. 17 containing reference to pp. 31-38 of the Panicos' printed brief in the appeal below). It is wrong also for the Government to say (Br. in Opp. 17) that on the day following the above incident the Panicos' counsel "asked for a psychiatric examination of *both* Panicos" (emphasis supplied), and (*id.*, 27) that both Panicos "claimed to be insane". This is wrong because the testi-

mony cited by the Government (Tr. 5679) shows only that Mr. Aronne's request for a psychiatric examination of Salvatore was accompanied by the offhand comment that "I think they are both a little balmy", but there was never any request for psychiatric examination of Carmine and it is preposterous, to anyone who knows this trial record, to say that Carmine Panico ever claimed to be insane. Obviously the Government's purpose in trying to insinuate the opposite is to ridicule the good faith of the request for psychiatric examination as to Salvatore by making it appear that indiscriminate claims of insanity were being asserted. It is also wrong for the Government to say (Br. in Opp. 19) that the Panicos' gags "consisted of a strip of cloth across the mouth". The record is clear that the gags originally placed upon the Panicos included adhesive tape which tore at their flesh (Tr. 6156—and see testimony cited *infra* in this paragraph)—more "comfortable" gags were later ordered by Judge MacMahon. It is also wrong for the Government to gloss over the important detail as to the shackling of the Panicos, which was in addition to their gags—especially the shackling of the petitioner Carmine Panico. There were chains around their stomachs chaining them to the chairs on which they sat, they were handcuffed, and their legs were shackled by leg-irons (Tr. 6088-6091, 6156, 6174-6175, 6319, 6337-6338, 6989-6989a, 6996-6997, 7149, 6971-6988, 7371-7378). See also our petition for certiorari herein pp. 17-23, 35-37. And it is wrong for the Government, in connection with the gagging and the shackling of the Panicos, to gloss over (Br. in Opp. 19, 31-32) the important chronological sequences of the successive physical restraints imposed upon Carmine (see our references in this paragraph *supra* on the subject of gagging and shackling).

6. The Government's discussion (Br. in Opp. 32-33) of our contention that Carmine was denied the right to counsel during the second trial ignores completely the following items which we advanced in our petition for certiorari: (1) The evidence introduced during Mr. Aronne's absence was the vital evidence on the substantive counts which was the indispensable basis for the introduction of the prodigious quantities of the "Orlandino" narcotics with which the Panicos were never connected other than through the associative misfortune of their being "conspiracy" defendants in the trial of this indictment combining substantive and conspiracy counts. (2) The Court-assigned attorney, Mr. Todaro, was also assigned to represent another defendant (Loicano) whose interests were in conflict with the Panicos. (3) Above all, the forced imposition of assigned counsel on the Panicos could only be justified, in view of the perfectly legitimate and necessitous reasons for Mr. Aronne's sudden and unexpected absence and the indicatedly short duration thereof, if a ramrod schedule for this trial was justified; the Government has not met this aspect of the issue at all; see the petition for certiorari recently filed on behalf of Loicano in No. 568, at pp. 50 *et seq.*, quoting from *United States* v. *Johnston*, 318 F. 2d 288 (C.A. 6 1963).

7. The Government's discussion of the evidence (Br. in Opp. 21, 24-25) coat-tails rides the decision of the Court below. That Court, the Government says (p. 21), "carefully considered" the sufficiency of the evidence and the question "merits no further review." (*ibid*). There is not a word in the Government's brief—nor was there in the "carefully considered" opinion of the Court below—about what we respectfully reiterate (Pet. Cert. 8-15) to have

been the crucial question of fatally defective ambiguity in the testimony of the accomplice witness Smith concerning the "he" (Carmine or Salvatore) who allegedly spoke *the sole words in this entire record* (the words about a "run" and "stuff"[5]) *from which any inference could remotely be drawn as to knowledgeful participation in the conspiracy by Carmine Panico* (or by Salvatore). The Government's closest approach to even recognizing the existence in the case of this all-important problem—on whose correct and just resolution depends the validity of the sentence of twelve years imprisonment for a hard-working young family man who has never before been in trouble in his life—is its altogether perfunctory discussion at Br. in Opp., 24-25 of the alleged joint presence of the two Panico brothers on the occasions when alleged packages of narcotics were allegedly delivered at the 1717 Club. From this, the Government grandly concludes that "such regular acceptance of narcotics formed a knowing link in the chain of importation and distribution of narcotics" (*id.*, 25), citing no cases—because there are no cases to support the idea that regular acceptance by "Z" of narcotics from "X" or from "Y" justifies an inference of "Z's" knowledge of a specific alleged conspiracy between "X" or "Y" on one hand and "A", "B", "C", "D", "E", etc., *ad infinitum* on the other hand.

8. The Government's answer to our contention that the Trial Court erroneously ruled that Smith was an accomplice as a matter of law misses our point completely (Br. in Opp., 41), we must respectfully state. After Carmine testified

[5] *N. B.* also: Unless Carmine was proved beyond a reasonable doubt to have been the "he" who spoke of a "run", there is not even proof that he knew what the alleged packages contained!

that he did not know Smith or have any dealings with him (6318-6336), the Trial Court charged the Jury that "he [Smith] is, by his own admission, an accomplice to the very charge against the defendants now on trial. * * *" In the prosecution of a crime, the government is frequently called upon to use persons who are accomplices. * * *. There is no requirement in the federal court that the testimony of an accomplice like Smith be corroborated. Conviction may rest upon the uncorroborated testimony of an accomplice if you believe it and find it credible. * * *." (J 133a, 134a).

This charge by the trial court was equivalent to a direction of a verdict of guilty. The charge completely negated the petitioner's testimony that he was not an accomplice of Smith. This sharp cleavage of testimony on the accomplice issue was one of fact solely for the jury's determination. *Holmgren v. United States*, 217 U.S. 509, 523; *Phelps v. United States*, 252 F. 2d 49, 53 (C.A. 5, 1958); *United States v. Vanco*, 131 F. 2d 123, 126 (C.C.A. 7, 1932); *United States v. Baldilmos*, 177 F. 2d 485, 488 (C.A. 7, 1949); *Ward v. United States*, 296 F. 2d 898, 902 (C.A. 5, 1961). The opinion of the Court below that the appellants misread the charge; that the court correctly restated Smith's testimony that "by his own admission she was an accomplice" to the crime charged and an instruction to scrutinize Smith's testimony with special care was not error (Pet. 49a), does not take into consideration all the comments made by the Trial Court on the accomplice issue and utterly ignores petitioner's contention that this issue was one of fact for the jury to decide. Petitioner's trial counsel took exception to the court's charge (J 221a-222a).

"Mr. Lewis: I also take exception to this remark made by your Honor; that there is no requirement under federal law that the testimony of an accomplice like Smith be corroborated. As a general proposition of law that is correct, but your Honor is now characterizing Smith as a matter of law to be an accomplice.

The Court: Please just state your exceptions, without argument.

Mr. Lewis: I ask your Honor to charge the jury that whether or not Smith is an accomplice is a question of fact and that you have charged them as a matter of law that he is an accomplice.

The Court: Your exception is noted. I decline to make it."

The Trial Court had every opportunity to give a corrective instruction. Its refusal to do so constitutes reversible error. The highly prejudicial effect of the Trial Court's charge in our case recalls the words of *United States* v. *Tomei*, 173 F. 2d 140, 142 (C.A. 3, 1949):

> "* * * If A's admission that he conspired with B is believed, it is pretty hard to avoid the conclusion that B must have conspired with A * * *."

The Trial Court's charge in our case that Smith by his own admission was an accomplice in the perpetration of a crime; that the Government is frequently called upon to use persons who are accomplices; that there is no requirement in the federal courts that the testimony of an accomplice like Smith be corroborated; that conviction may rest upon the uncorroborated testimony of an accomplice if you believe it and find it credible—could leave no doubt in the minds of the jurors that the Trial Court had charged them that Smith was an accomplice. That being so, it would be hard

for the jury to avoid the conclusion that petitioner was an accomplice of Smith. This charge to the jury was erroneous, misleading and prejudicial. Petitioner's guilt was not found by the Jury according to the procedure and standards appropriate for criminal trials in the federal courts. *Bollenbach v. United States*, 326 U.S. 607, 614.

9. The Government has completely missed also our point (Pet. 3, 24), we submit, as to the Trial Court's prejudicial instruction which spotlighted the failure of Salvatore Panico to take the stand (Br. in Opp. 42). After the Trial Court had charged the jury that they were to draw no unfavorable inferences from the failure of any defendant to testify, the Court refused the request of trial counsel to charge the jury that Salvatore Panico wanted to testify but that the Court had refused to permit him to do so (J 222a). As was said by Judge Learned Hand in *United States v. DiCarlo*, 64 F. 2d 15, 18 (C.A. 2, 1933):

> "We should be blind to realities if we supposed that juries are unconscious of the omission of a defendant to take the stand. * * * ".

The two Panico brothers were like two peas in a pod to the Jury. Any error committed as to one of them had a prejudicial effect upon the other. The Court below reversed the conviction of Salvatore because of the Trial Court's refusal to permit him to testify. It should have also reversed as to Carmine because of the above-described impact of this situation on the latter's right to a fair trial.

10. In view of the gross inconsistency of Smith's testimony at the first trial and his grand jury testimony as compared with his testimony at the second trial in relation to petitioner (Pet. 13-14); the many egregious errors com-

mitted by the Trial Court as heretofore recited; and the facts that the only evidence adduced by the government against petitioner came from the mouth of a debased individual who was an extremely well-paid informer as contrasted with the testimony of petitioner who had led an exemplary life and had been steadily employed since the age of sixteen except for the period when he was in the armed forces, who had never been arrested prior to his arrest in this case, who had been employed as a liquor salesman duly licensed by the State of New York, and whose testimony on direct examination was so frank, honest and forthright, that Government counsel waived cross examination. We respectfully submit that the words of *United States* v. *Pa[illegible]*, 305 F. 2d 534, 536 (C.A. 2 1962) are most appropriate.

> "The Government's case rested entirely upon the uncorroborated testimony, inconsistent with his earlier testimony in some respects of an accomplice and co-conspirator who had the strongest possible reasons to become a Government witness. We must therefore scrutinize any claimed error with extreme care since there is a grave possibility of prejudice to the defendants in a case such as this by error which might in other circumstances be deemed relatively minor. (Glasser v. United States, 315 U.S. 60, 67, 62 S. Ct. 457)."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted; and that, in any event, the petition should not be denied until after there shall have been reached a final adjudication or other disposition of the now renewedly pending (pursuant to this Court's decision of October 21, 1963 in No. 45) question of the mental competency of Salvatore Panico.

Respectfully submitted.

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